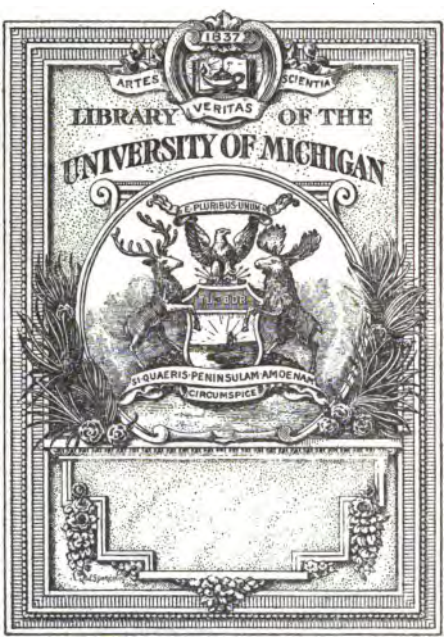
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HOME RULE

AND

IMPERIAL UNITY

AN ARGUMENT FOR

THE GLADSTONE-MORLEY SCHEME

BY

DAVID MABELAN

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IT is a remark of John Stuart Mill's, in dealing with the causes of human progress, "that the point in which, above all, the influence of remarkable individuals is decisive, is in determining the celerity of the movement. In most states of society it is the existence of great men which decides even whether there shall be any progress."

A curious proof of the justice of this observation is afforded by the effect of the action of Mr. Gladstone in proposing to grant what is called "Home Rule" to Ireland. To the dispassionate observer of the course of politics it must have been long evident that a change in the relations of Great Britain and Ireland was inevitable. Mr. Gladstone has brought the question to the very front of the political battle. From being a possibility "Home Rule," notwithstanding the result of the general election, has become a certainty. The minds of large numbers of the electors and even of thoughtful politicians have become reconciled to a change, from which a few months

ago they would have recoiled as visionary and imprudent.

That protests should be made by political opponents against the personal ascendancy of the Prime Minister, and that his motives and his character should be assailed with the grossest virulence, was only to be expected. But in fact the question whether a great concentration of power in the hands of one member of the Cabinet is or is not dangerous has nothing to do with the issue before the country. Whether Mr. Gladstone is a false Achitophel,

> "Resolved to ruin or to rule the State,"

or a great and honest statesman, the "imperial brilliance" of whose mind is fit to be "a steadfast light to England," is irrelevant to the question whether his scheme of self-government for Ireland is a good or a bad scheme.

"The Ministers have advised and her Majesty has been pleased to sanction the dissolution of Parliament for the decision by the nation of the gravest and likewise the simplest issue which has been submitted to it for half a century." So said Mr. Gladstone in his address to his constituents. That the issue was grave was admitted by all; that it was simple was not so readily conceded.

And yet it is quite true that, so far as the electorate was concerned, the issue was simple. Home Rule in some form corresponding to the main outlines of Mr. Gladstone's measure is even now the only practicable

alternative to coercion. The proof of this assertion would involve an essay upon it alone. I can now only indicate the three facts which seem to me to justify the statement, and which are too commonly neglected in the discussion of the subject.

The first is, that the principle of nationality which has played so large a part in recent European political history is the real and ultimate basis of the claim of Ireland to self-government. The strong national sentiment felt by the majority of Irish people, however it has been created, is strictly analogous to that passionate aspiration of Hungarian and Italian patriots which derived such support from the ardent sympathy of English Liberalism. It has been observed, "A portion of mankind may be said to constitute a nationality if they are united among themselves by common sympathies which do not exist between them and others—which make them co-operate with each other more readily than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively."* It is submitted that this is clearly true of Ireland.

The second fact to which I wish to call attention is the very large admission of the political capacity of the Irish people that is made by the maintenance of the Constitution as it now exists. The Irish people return representatives to the Imperial Parliament. If

* Mill, "Representative Government," c. 16.

they are so ignorant and degraded that they cannot be trusted to elect men fit to make laws affecting themselves alone, *à fortiori* they are too ignorant and degraded to be allowed to send members to Westminster to make laws for the whole empire. The arguments so glibly used, founded on the "profound incapacity" of the Irish people, prove, if they be true, not so much that Home Rule ought not to be granted, but that the Irish people should be deprived altogether of representative institutions.

Lastly, the existence of the national sentiment and the denial of its logical outcome, so long as the Irish representation is suffered to remain, must throw the whole machinery of government out of gear, for it results in the formation of a party strong enough to disorganise the working of the House of Commons. A party banded together for the purpose of making all government impossible strikes at the fundamental principle of a democracy; for self-government implies an agreement among those to whom the powers of the community are delegated that these powers shall be used for the good of all, for the defence of the whole empire from attacks from without, and the maintenance of the authority of law within its bounds, however much they may differ as to the principles by which these objects may best be maintained.

It follows, therefore, that unless representative institutions are taken away from Ireland, the demand of the Irish people must be complied with, and that the

concession made must be such as fairly meets the requirements of that party and affords satisfaction to the national sentiment. No half-and-half measure of local government will do. So also no half-and-half measure of coercion will do. To give the Irish members a place in the House of Commons and to expel them when they carry out the wishes of their constituents, to give the franchise to the Irish people and at the same time to pass for their governance Peace Preservation Acts and Coercion Acts affecting the primary constitutional rights, is illogical and absurd, and, as experience shows, is useless.

There is, however, a method of government which, so far as the mere preservation of order in Ireland is concerned, might be superficially successful. That method is the government of Ireland as a Crown colony. Let the legislature give to an Irish Council nominated by the Crown absolute powers of legislation for Ireland, let Irish representation in the Imperial Parliament be suspended, let the Council have the control of an army of 30,000 men, and it is probable that before long such a government might produce quiet in Ireland; but the quiet so produced would not be the peace of an orderly, progressive, and civilised people, but the peace of premature decay and national death. So far as one can see, that is the only policy of coercion which is likely to succeed. Such a policy is not openly advocated even by Lord Salisbury, and it has no practical chance of adoption

by the English people. Assuming then, as most thoughtful writers seem to do, that Home Rule in some form is inevitable, the first question that is asked about any suggested scheme is naturally, Does it impair the unity of the Empire?

Mr. Gladstone in introducing his Bill laid it down as an essential condition of any plan that Parliament could be asked or could be expected to entertain, that the unity of the Empire must not be placed in jeopardy; the safety and welfare of the whole, if there should be an unfortunate conflict, which he did not believe, must be preferred to the security and advantage of a part. Now it so happens that most of the speeches delivered by those who were opposed to the scheme of the Government mainly rested on an attempt to prove that this condition was not fulfilled. And it happened also, as might indeed have been expected, that much of the argument against the Bill depended on the legal and constitutional effect of its different clauses. I propose to inquire whether the scheme of Irish government disclosed in the Bill satisfied the test to which Mr. Gladstone voluntarily submitted it.

It may perhaps be objected that such an inquiry is useless because of the result of the general election. But very little consideration will convince any one who attempts to think in what form Home Rule can be granted, that any scheme which is likely to command the assent of the Irish members,

and at the same time does not involve very sweeping changes, not only in the relations of Great Britain and Ireland, but in the form and law of the whole constitution, must follow the "main outlines" of the Gladstone-Morley Bill. Stated very generally, the effect of the Bill would have been to create in Ireland a subordinate government for Irish affairs of the same type as the governments of those colonies which have representative institutions and responsible governments. It adopted the division of political powers into legislative, executive, and judicial; and seemed to intend that the relations of these powers in Ireland should be similar to those which exist in the Imperial government. If this type be departed from, it will be found that either the new Irish government will be little more than a mere local government, or that great changes in the constitutional law of the Empire must be made.

But in any case the Bill is a useful "draft for discussion," and the inquiry whether it did or did not impair the unity of the Empire illustrates the principles on which the solution of the same problem in regard to any other Bill or new scheme must depend.

§ 1. The Unity of the Empire.

In making the inquiry which I have mentioned as the purpose of this essay, it is necessary to give to the

term "Unity of the Empire" some more precise meaning than it has in ordinary conversation. The word "empire" and the ideas it has from time to time connoted have played a great part in political history. But we need not now concern ourselves with tracing back its meaning to its application to the special powers of certain Roman magistrates. An empire now means either the territories governed by a person styled "emperor," or more generally any extensive political dominion. The ideas which upon analysis it involves are these:—

(I.) It is a society of men permanently established for a political end by common subjection to some sovereign authority.

(II.) It possesses a definite territory.

(III.) It is independent of external control, *i.e.* its sovereign authority is not subject to any other political authority.

These three ideas are essential; but they are common to the conception of an empire and any other sovereign state. As generally used, the term empire is only applied to sovereign states large in point of population and extent of territory, with a monarchical form of government, generally having under their control subordinate states.

Now if this analysis is considered, it will be found that the unity of an empire in the last resort depends on the common subjection of all its members to a supreme political authority. It is this subjection

which forms the connecting link between all its parts. The rules of conduct which the Sovereign lays down are laws, and a common obligation to obey these laws is the most salient tie between the different men coming within the scope of the Imperial authority. Identity of laws is not necessary; for the Sovereign may enact one set of laws for one part and another set for another part of the Empire. It is, then, a legal bond which unites an empire. Common subjection to a sovereign authority is the mark which distinguishes an empire or state in modern times from other societies of men.

These remarks are of course elementary to the jurist trained in the school of Austin; but it is very surprising to observe how little they are understood or borne in mind by those who attempt to enlighten the public mind on political questions, and for that reason it has been deemed well to state them clearly at the outset. If this analysis is applied to the British Empire, it will be found that the Unity of the Empire really means the supremacy of the Imperial Parliament. But for practical purposes it is, owing to the peculiar theories of the Constitution, better to amplify the matter a little and say that the Unity of the Empire means:—

(I.) That allegiance is due from all British subjects to her Majesty.

(II.) That all executive and judicial power is derived from the Queen in Council.

(III.) That the Parliament of the United Kingdom of Great Britain and Ireland can make laws at its absolute discretion binding throughout the whole or any part of the Empire.

So long as we are dealing with political questions any attempt to base the Unity of the Empire on anything but this common duty to obey the commands of the sovereign power ends in confusion. For instance, in regard to race, religion, habits of life, laws, in fact in regard to everything which can form a bond of union between men, except subjection to a common sovereign, there is more similarity between us and the people of the United States than between us and the people of India. Neither community of race, of religion, of habits, of morals can be predicated of England and India. The only fact (apart from those which are common to all men) that cements the people of Bengal with those of Canada is that both are subject to the authority of the Imperial Parliament at Westminster. There may be other ties than the legal tie between individual Hindoos and individual Canadians; but the only tie common to them all is subjection to the supreme authority of the Empire. It is not asserted of this conception of the Unity of the Empire that it is universally true; nor that the sovereignty of the Imperial Parliament is the cause in the scientific sense of that term of the existence of the Empire. All that is claimed for it is that, assuming the current ideas of political powers, of the functions of sovereignty, and

of the effect and operation of laws, which influence us in carrying on the business of government, to be true—taking these ideas for granted, then the Unity of the Empire does depend on the sovereignty of Parliament, and that the Union can only be preserved by the effective assertion of that sovereignty when necessary, followed by the acquiescence of all the parts of the Empire, even when the policy of Parliament runs counter to the interests or the wishes of individuals or parties or colonies.

It is now very common to compare the state to a living being; to describe it as an organic body, created and kept alive by natural laws as uniform and inflexible as those which guide the movements of the planets. The comparison is felicitous but not very new. Its rigid and complete application to the art of government is, however, apt to lead to political fatalism, and to be destructive of all those qualities in individuals by which democracy at any rate can alone hope to succeed. But I am far from saying that the generalisations of modern thinkers are unsound, or that there may not come a time when the phenomena connected with the government of men may not become an exact science, and the consequences of particular lines of policy or laws foretold with accuracy. That time is not yet, and government as a practical art is founded on the freedom of the individual will. Every legislator and every judge assumes that those to whom the laws are addressed are free to regulate

their conduct by them. Every statesman acts on the assumption that he can control the future of his country—that wise measures will lead to prosperity and a foolish policy to discontent and ruin. We all, in fact, in discussing political questions and discharging our duties as citizens, do so on the hypothesis that we have a choice of action, and that our determination affects the attainment of the end we have in view. Taking this standpoint, there is no objection to defining law as the command of the Sovereign, and making the bond of union among the members of a state the relation of Sovereign and subject.

But a union founded on this relationship is only real when the claim of the Sovereign is acknowledged. A mere theoretical claim such as was formerly asserted by the English monarchs to the kingdom of France or by Spain to the Western World gives rise to no real unity. It is sovereignty *de facto* as well as *de jure*, and not merely *de jure*, that is an actual coherent force. An empire is only united when its sovereign authority is generally obeyed. Whatever makes for obedience makes for union.

But what does make for obedience? We here touch on one of the most obscure and difficult questions connected with human society—the sources and nature of the influence exercised by the will of one human being on that of another; and it must be remembered that the question why one set of men forming a sovereign political authority are able to

command the obedience of another set of men called subjects, is only a particular case of the larger problem. It would be interesting, for instance, to try to explain why it is that a mere handful of men from a far-off northern island are able to rule with no great military parade, millions of human beings in India, distinct in religion and law and custom from themselves, and only connected by their common Aryan descent. Fortunate indeed would be the statesman who knew the causes of so remarkable a phenomenon! For practical purposes we have to content ourselves with empirical maxims and principles drawn from our own observation or the imperfect accounts of the past afforded by history.

One fact is very clear—that force alone cannot for any long time secure subjection. Military empires are even more short-lived than republics in South America. Empire may be founded by the sword, but it cannot be maintained by it. It is interesting to compare the ephemeral empire of Alexander the Great with the solid conquests of Rome. I am only too well aware it is not very safe to dogmatise about the Roman Empire. We are only now getting to understand its provincial administration; but we know enough to enable one to say that the idea that the Roman Empire was held together simply by the superiority of Roman arms is utterly fallacious. "The obedience of the Roman world was uniform, voluntary, and permanent . . . . The legions were destined

to serve against the public enemy, and the civil magistrate seldom required the aid of a military force."* The rule of the Roman Augustus was really founded on a system of law and government which survived emperors and prætors and prefects, just as the English Constitution survives kings and premiers. It was to the legal capacity and the organising power of a long series of Roman officials that the extended duration and wonderful influence of the Empire was due. The idea of law permeated the Roman world, and the provincial and the barbarian were brought face to face with governors who ruled not arbitrarily like Eastern kings, nor with the rough justice of the chief of a tribe, but according to certain rules, founded on inflexible conceptions of Roman sovereignty, but who did not rashly or hastily interfere with the operation of the customary law of the subject races. "Beneath the action of Roman courts and procedure there must have long existed a native law and native usage, which only gradually gave way to the extension of Roman machinery." † The long-continued success of the Roman organisation was the triumph of intellect and not of force, and its far-reaching influence on European history a conclusive proof of the ascendancy of clear method and well-developed laws on the minds of men.

In one sense, of course, Government must rely

* Gibbon, ed. Milman, i. pp. 160, 161.

† Merivale, "History of the Romans," viii. p. 296. Cf. Maine, "Early History of Institutions," 390.

on force. Individuals who infringe the law must be punished and must be constrained by the application of physical force. But the compulsion is only successful when the individuals who require it form a class numerically small as compared with the whole community. If the majority of Englishmen were habitually disobedient to the law our existing arrangements would not be sufficient for its enforcement for a week, and no force that exists or could be devised within the limits of the realm could coerce them into obedience. It is a vulgar and superficial view of English society which leads people to say that our existing law and our existing government ultimately rest on the standing army. It is not, indeed, very easy to classify or determine the motives which make most of the inhabitants of Great Britain acquiesce without a murmur in the judgments of the law courts. Habit, the sentiment of loyalty to the Crown, the feeling that it is morally wrong to disobey the law, the social stigma attaching to punishment, religion, pride in the historical continuity of the Constitution, and, above all, the conviction that upon the whole his own individual interests are best guarded by the enforcement of legal rules over the rest of the community, all combine to produce the law-abiding character of the English citizen. The first problem of statesmanship is to produce and maintain in the minds of the members of society this reverent attitude towards the law. In some backward communities it may

perhaps be retained by a devotion to some sovereign person almost amounting to religious worship. But in a self-governed nation, where by the aid of representative institutions the ultimate political power is widely diffused, where freedom of discussion is almost unlimited, and every act of the legislature and executive is exposed to the keenest criticism, and where large opportunities for combination for political purposes exist, this law-abiding character can only remain so long as three conditions at any rate are fulfilled:—

(I.) That the laws are substantially just according to the current standard of ethics.

(II.) That the body which creates the laws and is the source of their authority commands the confidence of the people.

(III.) That the executive and judicial officers who administer and enforce the law are regarded with respect as the trusted agents of the community, and not with hatred or fear as the servants of a hostile power.

If these conditions are not fulfilled in regard to the whole community or any large and well-defined section of society, disaffection towards the administration and habitual neglect of legal process will be the consequences. The law and its administrators will fall into general contempt, and punishment, when inflicted, will be martyrdom and not disgrace.

But it may be said that all this does not touch the question of making sovereignty effective as between

the central government and the province of an empire; that it only affects the maintenance of the power of the subordinate government. The success of this subordinate government is, however, the very first condition of Imperial control. Unless order is maintained in the provinces, unless the local laws are obeyed, the power of the central government is for the time at any rate in abeyance. Assuming the dependent administration to be successful in creating the law-abiding character on which the performance of political duties as we have seen hinges, it will be found that the prevalence of this type in the province under its control will lead to respect for Imperial laws, and that the same spirit of self-denial, which causes the citizen to sacrifice the inclination of the moment to the will of the government with which he is in immediate contact, will induce the local community to subordinate its own wishes to the general interests of the whole empire. Similar considerations indeed will be found to apply to the relations between subordinate governments and an imperial government as to those between any sovereign and individual subjects. The former relations are no doubt more delicate; the application of the force of the whole empire to the coercion of a colony is obviously more difficult than the punishment of an individual. But it may be laid down that the more enlightened and orderly the colony the more easy is it for the Imperial Government to induce the administration of the colony to act in

accordance with any demand made in the interest of the whole empire.

The conclusion then which is to be drawn from an attempt to analyse the causes which impel men to obey governments is that force, at any rate so far as democracies go, is not the efficient support of the law; but that sovereignty can only become effective and permanent by the gradual creation of a law-abiding national character; and that this holds good not only of a single community but of all the constituents, nations, or provinces of an empire; and that its real unity depends upon the efficiency of its sovereignty, more especially on critical occasions.

§ 2. The Legal Relations of England and Ireland.

For the right understanding of the effect of the creation of a legislature in Ireland it is necessary that the relations of Great Britain and Ireland in the past, as they are presented by lawyers and historians of the Constitution, should be clearly comprehended. As there is, however, much confusion in the minds of people as to the history of those relations, I trust it will not be thought useless to give a short account of the position of Ireland in regard to the English Parliament before the Act of Union.

According to the theory of the English lawyer, the

conquest of Ireland was effected by Henry II. That monarch, small though his share in the so-called reduction of the island was, received the homage and allegiance of the Irish princes. The Norman adventurers, who were the real conquerors, received from the King, as feudal tenants, enormous grants of the conquered territory, and probably Hallam is quite right in saying that the whole island, with the exception of the county of Dublin and the maritime towns, was divided before the thirteenth century, and most of it in the twelfth, among ten English families. How far these grants were really operative, how far the rights which these feudal tenants acquired were enforceable against Irish kings or the chieftains of Irish septs, is very doubtful. Whatever the nature and effect of these transactions, it is clear that the English kings thenceforward assumed themselves to be entitled to the lordship of Ireland, and called themselves "lords" of Ireland. The style *Dominus Hiberniæ* was used by them until the thirty-third year of Henry VIII., when that monarch took the title of "King of Ireland," a title recognised by statute 35 Henry VIII., chap. 3.

It is stated by the English lawyers that the laws of England were received and sworn to by the Irish nation at the Council of Leinster.* Further, it is assumed that when King John in the twelfth year of his reign went over into Ireland, he by letters patent,

* Pryn, on 4th Inst., 249.

in right of conquest, established and ordained that Ireland should be governed by the laws of England.* Henry III. and Edward I. made ordinances to the same effect, and at length, in a Parliament holden at Kilkenny in the fortieth year of Edward III., under Lionel, Duke of Clarence, Brehon Law (the ancient Irish law) was formally abolished, it being unanimously declared to be no law but a "lewd custom, crept in of later times."†

It further appears that so far as those parts of Ireland in which the dominion of the English kings was something more than theoretical, a government had been established in most respects analogous to that by which England was ruled. There was a Justiciary, and also a Lord Deputy, who was assisted by a Council of judges and officers, together with the prelates and barons. This administration was subordinate to the King and the Council of England. It furthermore appears that Courts of Chancery, King's Bench, Common Pleas, and Exchequer were established in Ireland; also that the Justiciary or Lord Deputy held Parliaments at his pleasure, and that, though these appear at first to have been simply assemblies of great men, that from the year 1295 knights of the shire were summoned in the same way as to the English Parliament. In 1341 it is said that deputies were summoned by the Earl of Desmond

* Vaughan, 294, 7 Reports, 23. 4 Coke's Inst., 141.

† 1 Blackstone, page 100.

from corporations, and in 1359 commons are mentioned as being a constituent part of Parliament. From this time to the time of Henry VII. the English power appears to have declined, though it is probably not true to assert that the island was not as a whole subject, according to the then theories of government, to the English king. Hallam says the English "were established in every province, and in perfect divisions of counties, and that an administration of justice subsisted; and even the Irish chieftains, though ruling their septs by the 'Brehon Law,' do not appear at that period to have refused the acknowledgment of the King's sovereignty." But it is probably true that at the time of Henry VII.'s accession, owing largely to the Wars of the Roses, the English authority was nominal, except as to a few seaports and to the four counties within what was called the English pale. From this time, however, the English power, both in fact and in law, began to increase.

It was in the tenth year of the reign of Henry VII. that the celebrated Statute called "Poyning's Law" was passed. It is only necessary to advert to those portions of the Act which relate to the operation of English law and the power of the Irish Parliament. It followed from the ordinance of John that, though the common law was made the rule of justice in Ireland, yet that no English statute made after that date extended into Ireland unless it was specially named in the statute, or included in some

general words.* By "Poyning's Law" this was altered, and it was enacted that all statutes lately made in England be admitted good and effectual in Ireland; and by judicial decisions this was construed to make all the statutes of the English Parliament, including *Magna Charta*, from the twelfth of John up to the time of the passing of the Act of Fealty good and binding in Ireland. But from that date the enactments of the English Parliament only applied in case Ireland was expressly, or by necessary implication, mentioned.

The most important enactment of "Poyning's Law," was that which defined and limited the power of the Irish Parliament by providing:—That before any Parliament should in future be summoned or held in Ireland, the chief Governor and Council should certify to the King under the Great Seal of Ireland the considerations and causes thereof, and the articles of the Acts proposed to be passed therein; and after that the King, in his Council of England, should have considered, approved, or altered the said Acts, or any of them, and certified them back, under the Great Seal of England, and should have given license to summon and to hold a Parliament, then that the same should be summoned and held, and therein the Act so certified, and no other, should be proposed, and rejected or received. These provisions of "Poyning's Act" were afterwards extended by the statute of the

* Year Book, 1 Henry VII., 3. 7 Reports, 22. 1 Blackstone, 101.

3rd and 4th P. & M., chapter 4, by its being enacted that any new propositions might be certified in England, even after the summons, and while the Parliament was being held. By these means the English Council secured the initiative of all Irish legislation, and protected itself against the ambition of the Governor, or his Council. Hallam observes that whatever might have been the motives of the statute, it proved in course of time the great means of preserving the subordination of the island.

It is not necessary, in order to understand the constitutional position of England towards Ireland, so far as the questions raised by the Home Rule scheme are concerned, to go into the confused history of the attempt made in the sixteenth century to impose upon the Irish people the Reformed religion. It is not until the time of James I. that anything like important events in the legal history of Ireland present themselves. The reign of that king is the one from which the present position of the island may be clearly deduced. Until then the Irish people had been treated as the inhabitants of a conquered country, and the Parliament to which we have been referring did not affect them so much as those who, whether English or Irish, were the inhabitants of the counties within the pale. Henceforth the whole island began to be treated in the same way, and, as English lawyers assumed, was subject to the English common law and to the overruling power of the English

Legislature. The period from this time to the Revolution of 1688 is one of confusion and of civil war; and any inferences that could be drawn from the transactions of the Parliament or the Irish Council during it, or from the constitutional literature of the time, cannot be treated as of much value.

We find, indeed, that "Poyning's Law," which at one time had been popular, became gradually recognised as destructive of any real power of the Irish Parliament, and the conclusive mark of the dependence of Ireland on the administration of England. By degrees it was found that, though the dependence of Ireland on the Crown of England was amply recognised (however much it might be disputed as to whom that crown belonged), that the dependence or subordination of the Irish Parliament to the English Parliament was not admitted; and Molyneux having in 1697 published a pamphlet setting up a claim on the part of the Irish Parliament to legislative supremacy, the House of Commons at Westminster came to resolutions against the book. A few years after a conflict took place between the House of Lords in Ireland and the English House of Lords with reference to the right of the latter to hear appeals from judgments of the former. The result of the disputes which thus arose was the passing of the statute 5 George I., chap. 5, which enacted "that the King's Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons of Great Britain in Par-

liament assembled, do, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the people in the kingdom of Ireland; and that the House of Lords of Ireland have not, nor of right ought to have, any jurisdiction to judge of, reverse, or affirm, any judgment, sentence, or decree given or made in any court within the said kingdom; and that all proceedings before the said House of Lords upon any such judgment, sentence, or decree, are, and are hereby declared to be utterly null and void, to all intents and purposes whatsoever."

It is hardly necessary to say that the doctrine embodied in this Act was not admitted in Ireland, though undoubtedly the orthodox view. "It had been," says Mr. Lecky,* "the doctrine of a long series of Irish antiquaries that the English settlers in Ireland had originally possessed a constitution in all respects similar to that of England, and that Poyning's Law was the first of a series of encroachments which had been ratified and consummated by the Declaratory Act of George I." This claim to legislative independence became more and more loudly asserted, and, under circumstances which may be gathered at length from the works of Mr. Froude and Mr. Lecky, was for the moment conceded in 1782, by the repeal of the Act of George I. in the Parliament of Great Britain, and the repeal of that part of Poyning's Law which

* "History of England in the Eighteenth Century," vol. iv. p. 489.

limited the powers of the Irish Parliament. The Bill by which the latter object was effected is the Irish Statute, 21 & 22 George III., c. 47, entitled an Act to regulate the manner of passing Bills and to prevent delays in the summoning of Parliament. It enacted that thenceforth no Bills should be certified to Great Britain but such as were approved by both Houses of Parliament, and under the Great Seal of Ireland, and without alteration (sec. 1), and that all such Bills as should be so certified, and returned under the Great Seal of Great Britain not altered, and none other should pass in the Parliament of Ireland (sec. 2); and that no Bill should be certified into Great Britain for holding a Parliament in Ireland, but no Parliament should be held without the licence first obtained from his Majesty, under the Seal of Great Britain. Thus was created what was called Grattan's Parliament, though it is obvious no new Legislature was instituted, but the Irish Parliament simply met under new conditions. The repeal of the Declaratory Act of George I. did not, from the point of view of the lawyer, destroy the supremacy of the British Parliament, for as we shall see, the then sitting Parliament could not legally bind its successors; and indeed the importance attached to the repeal was itself an admission of the sovereignty of the British Parliament.

The Irish Parliament continued to exist down to the end of the year 1800. Much difference of opinion has arisen as to its action during the eighteen years of

freedom from control which followed the reforms of 1782, as to the expediency of the Union, and as to the means by which the consent of the Irish members to the ratification of the Articles was obtained. It is not necessary here to make any observations on these matters of controversy. It is sufficient to state that the Articles of Union were ratified by both Parliaments on the 2nd July, 1800, and came into operation on the 1st of January, 1801. The first three are the only ones to which attention need here be drawn, and they are as follows :—

(i.) That it be the first Article of the Union of the kingdoms of Great Britain and Ireland, that the said kingdoms of Great Britain and Ireland shall, upon the 1st day of January, which shall be in the year of our Lord, 1801, and for ever after, be united into one kingdom by the name of the United Kingdom of Great Britain and Ireland; and that the Royal Style and titles appertaining to the Imperial Crown of the said United Kingdom and its dependencies, and also the Ensigns, Armorial Flags, and Banners thereof shall be such as His Majesty, by his Royal Proclamation under the Great Seal of the United Kingdom, shall be pleased to appoint.

(ii.) That the succession to the Imperial Crown of the said United Kingdom and its Dominions thereunto belonging, shall continue limited and settled in the same manner as the succession to the Imperial Crown of the said Kingdoms of Great Britain and Ireland

now stands limited and settled according to the existing laws, and to the terms of the union between England and Scotland.

(iii.) That the said United Kingdom be represented in one and the same Parliament, to be styled "the Parliament of the United Kingdom of Great Britain and Ireland."

§ 3. The Sovereignty of Parliament.

The sovereignty of the Imperial Parliament is the first principle of constitutional law; it is the ultimate fact of the Constitution; it is recognised as the fundamental principle by every court of justice throughout the length and breadth of the Empire. The import of the term "sovereignty" might give rise even now to—and has in the past been the source of—much philosophic and historical discussion. Its practical import in the daily business of political life and the courts of law can be fixed with sufficient precision. Let us turn, for instance, to an acknowledged authority—"Wheaton's International Law." The writer of that work defines "sovereignty" as "the supreme power by which any state is governed,"* and he defines "a sovereign state as being that of a people or nation, whatever may be the form of its internal constitution, which governs itself independently of foreign

* Lawrence's Wheaton, p. 35.

powers." * This supreme power, he says, may be exercised either externally or internally. "Internal sovereignty is that which is inherent in the people of any state, or vested in its ruler by its municipal constitution or fundamental laws." † "External sovereignty consists in the independence of one political society in respect of all other political societies." ‡

The question then is: Does this proposed Bill deprive the Imperial Parliament of the internal or external sovereignty of the Empire? Does it limit the power of the Imperial Parliament in regard to the government of Ireland? Does it diminish the independence of the Empire in regard to foreign states, or create in Ireland a new state, sovereign in regard to foreign powers? To answer these questions it is necessary to bear in mind the law in regard to the English Constitution. It has been said above that the Imperial Parliament is the supreme political authority of the Empire; and in order to understand the question which is raised it is necessary to remember all that this principle implies. The voice of Parliament, duly summoned and held, is the arbiter of what is or shall be law. But for this purpose the will of

* Lawrence's Wheaton, p. 58.

† "When a body of persons, yielding obedience to no superior, issue their commands to certain other persons to do or forbear from doing certain acts, and threaten to punish the disobedience of their commands by the infliction of pain, they are said to establish or exercise political or civil government. The persons who issue and enforce these commands are said to possess the governing power, and their acts are called the acts of government."—Lewis, "Use and Abuse of Political Terms," 17.

‡ Ibid. pp. 36 and 37.

Parliament must be expressed in a particular way, viz. by an Act of Parliament—by a Bill passed by the House of Commons and the House of Lords, to which the assent of the Queen has been given in the prescribed manner. Neither the will of the Queen, nor the will of the Lords, nor the will of the Commons is law. The Queen in Parliament, or the High Court of Parliament expressing its will in an Act of Parliament, is discharging the highest function of sovereignty. Its command so expressed is law. All who are subject to it are legally bound by its command, and its command is the test of legal right and legal wrong; and every judge and every court in every part of the Empire is bound to administer justice in accordance with that test.

The action of Parliament is legislative; and though by legislation it can control the executive and judicial authorities, according to constitutional law it is the Queen in Council that exercises the executive powers of sovereignty. It is, for instance, the Queen, through the Secretary of State for Foreign Affairs, who signs treaties, declares war, or blockades a foreign port; it is the Queen who accredits an ambassador or minister to a foreign state; it is in the Queen's name, through her Ministers, that the taxes, as imposed by Parliament, are raised and applied to the purposes to which Parliament has appropriated them. And similar remarks are true of other branches of the Administration. It is unnecessary for my present purpose to

go into the question of how, in fact, Parliament, or rather the House of Commons, really controls the Queen in Council; it is sufficient to state generally that it does so—by the recognition by the courts of justice that its Acts are law; and by the principle that though "the Queen can herself do no wrong," and is not amenable to the jurisdiction of any court, some person is legally responsible for every act done by the Crown, and that no one can plead as the justification for an illegal act that he did what is complained of by the authority of her Majesty.*

Lastly, besides the executive, there is the judicial authority. The judges hold their authority from the Crown, *quam diu bene se gesserint*, and are removable only upon the address of both the House of Lords and the House of Commons. Their duty is to try the cases which come before them according to law, and therefore to obey the Acts from time to time passed by the Imperial Parliament.

Such being the general theory of the Constitution, what would have been the effect of Mr. Gladstone's Bill, if it had become law, upon what Wheaton calls "the external sovereignty of the Empire"? Now if we turn to it we shall find that by section 3 the Legislature of Ireland were not to make laws relating to the making of peace or war, to treaties and other relations with foreign states, or to relations between the various parts of her Majesty's dominions, or to prizes

* *V. e.g.* Feather *v.* The Queen, 35 L. J. Q. B. 200 per Cockburn, C. J. 209.

or booty of war, or to offences against the law of nations, or to offences committed in violation of any treaty made or hereafter to be made between her Majesty and any foreign state; or offences committed on the high seas; or to treason, alienage, or naturalisation; or trade, or navigation, or quarantine. Legislation upon all these matters was reserved to the Imperial Parliament; and if the Bill had passed the relations of the United Kingdom to foreign states would have remained the same as before. The Bill would not have made Ireland a sovereign state according to international law, and it would, so far as foreign countries were concerned, have continued to be treated as a part of the British Empire.

Let us turn now to the effect of the Bill on the internal sovereignty of the Imperial Parliament. The question whether this sovereignty would have been maintained if the Bill had become law depends on whether the supreme legislative control of the Imperial Parliament was limited; or, to put the matter in another way, whether its effect would have been to create a Legislature co-ordinate in regard to some of the subject matters of possible legislation with the Imperial Parliament. To raise the question in a concrete form, let us see exactly what the Bill proposed to do. By section 1 it established in Ireland a Legislature consisting of her Majesty the Queen and an Irish legislative body; and by section 2 it proposed to enact that, "with the exceptions and subject to the restric-

tions in this Act mentioned, it shall be lawful for her Majesty the Queen, by and with the advice of the Irish legislative body, to make laws for the peace, order, and good government of Ireland, and by any such law to alter or repeal any law in Ireland. By sections 3 and 4 it excepted and reserved certain matters from the powers of the Irish Legislature; and by section 39 it proposed to enact "that from the appointed day the Act shall not, except such provisions thereof as are declared to be alterable by the Legislature of Ireland, be altered," except in the manner therein provided.

To raise the question whether the supremacy of the Imperial Parliament would be legally affected let us consider the effect of section 39. Could the Imperial Parliament, assuming this Bill to have become law, repeal or alter any section of the Bill without complying with the 39th section? Suppose that this Bill had been passed, and became an Act of Parliament in 1886, could the Imperial Parliament in 1887 repeal it? And assuming that it were repealed in 1887, would the judges of Ireland and the Judicial Committee of the Privy Council be legally bound to treat the repeal as effective? It is submitted that the Imperial Parliament could in the case supposed do so, and that any judge of any court in the Empire before whom the question involving the validity of the repealing statute came, would be bound to treat the statute as in fact repealed.

Let us see how the matter stands upon authority. Coke says: "Of the power and jurisdiction of the Parliament for making of laws in proceeding by bill, it is so transcendent and absolute as it cannot be confined, either for causes or persons, within any bounds."* Blackstone says: "It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and extending of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the Constitution of these realms."† That the language of this Bill is in its terms an attempt to control the action of future Parliaments is obvious from the 39th section. Such attempts have been made before, and, in accordance with the principles laid down by Coke and Blackstone, have been held vain and of no effect. For instance, the 5th article of the Act of Union of Great Britain and Ireland, 39 & 40 George III., chap. 67, provided that the Churches of England and Ireland, as then by law established, were to be united into one Protestant Episcopal Church, to be called the United Church of England and Ireland; and that the doctrine, worship, and discipline of the said Church be and remain in full force, as the same was then by law established for the Church of England; and that the

* 4th Inst. 36. † Blackstone, Comm. i. pp. 160, 161.

continuance and preservation of the said United Church as the Established Church of England and Ireland should be admitted and be taken to be an essential and fundamental part of the union. And yet the Irish Church Act of 1869 disestablished and disendowed the one Protestant and Episcopal Church of England and Ireland; and that Act has been carried out. And if the Parliament of 1869 had power legally to disestablish that United Church in Ireland, notwithstanding the words of the Act of Union, the Parliament of 1887 would have an equal right to repeal the Government of Ireland Act of 1886. Mr. Todd, in his work on "Parliamentary Government in the British Colonies," says it is certain that a Parliament cannot so bind its successors by the terms of any statute as to limit the discretion of a future Parliament, and thereby disable the Legislature from entire freedom of action at any future time when it might be needful to invoke the interposition of Parliament for the public welfare.* And this view is supported by Professor Dicey, who says that "there is no power which under the English Constitution can come into rivalry with the legislative sovereignty of Parliament."† He further says that "no one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence, or receives any countenance either from Parliament or from the practice of the courts."‡

* P. 192. † Law of the Constitution, p. 64. ‡ Ibid.

Now it is to be observed that for the complete legislative authority of the Imperial Parliament in Ireland these authorities do not rely—neither indeed do any other authorities—on the Act of Union. The authority of Parliament is independent of that Act or any Act of Parliament. To make the supremacy of the Imperial Parliament depend on any statute would involve an absurdity; for law is the creature of sovereignty. An Act of Parliament presupposes and is the offspring of the sovereignty of Parliament. It has been seen above that from the earliest times the Parliament of England enacted laws for Ireland, which was a dependent kingdom, and though it in 1782 repealed the Act of George I. (which was only declaratory), it could have re-enacted that Bill at any moment.

Let it be assumed, however, that the Irish Parliament was after 1782 a Parliament co-ordinate with that of Great Britain, and that the Act of Union is to be looked at as the result of a treaty between the Parliament of Ireland and the Parliament of Great Britain, each equally sovereign in its own sphere, and that the legislative supremacy of the Parliament of the United Kingdom over Ireland is legally and constitutionally to be derived from the Act of Union, there was nothing in the Bill of Mr. Gladstone which took away the legal sovereignty of the Parliament of the United Kingdom. The Act of Union was not repealed. It created no sovereign Parliament. The Queen, who

was a constituent part of the proposed Legislature, was to be still the Queen of the United Kingdom of Great Britain and Ireland. By the Bill certain powers of legislation were delegated to Irish Legislature. It said simply that that Legislature might make laws in regard to certain matters. It did not say that the Imperial Parliament should henceforth *not* make laws binding in regard to the same matters. And if it had, the discretion of future Parliaments would not have been fettered. These conclusions really logically follow from the very nature of the supreme and absolute authority; for if it once be granted, as it must be according to the theory of the Constitution, that at every moment and at any moment at which Parliament is sitting it is supreme, it follows that any Parliament sitting and supreme at any given moment cannot be limited or conditioned by anything that has happened before. But it must be borne in mind that the legal supremacy recognised by constitutional lawyers is only a supremacy relative to those who are subject to the authority of Parliament, and only enforceable by those who may, directly or indirectly, be authorised so to enforce its power, viz. by the courts of justice in the territorial limits of the Empire.

It has been contended that this Bill was really a convention or treaty with the Irish people, and that inasmuch as Parliament bound itself not to alter the Act, except in the manner provided by section 39, it would be a breach of faith and contract to repeal it. But it

is to be observed that the question is not one of faith or of morals, but of law, and that no legal contract can be made between the sovereign authority and those subject to it; for a contract implies a duty or obligation, and legal duty or obligation is created by law—that is to say, by the command of the Sovereign directed to the subject. But a legal duty on the part of the Sovereign towards the subject cannot exist, because the Sovereign cannot command itself. These are, of course, elementary propositions to those who accept the analysis of legal conceptions made by Austin. If the principles laid down above are correct, it follows that from a merely legal point of view—from the point of view of abstract legal right—the Bill of Mr. Gladstone did not affect the supreme legislative authority of the Imperial Parliament. And it is apparent, too, that the 24th clause of the Bill, which provided that "On and after the appointed day Ireland shall cease, except in the event hereafter in this Act mentioned, to return representative peers to the House of Lords, or members to the House of Commons, and the persons who on the said day are such representative peers and members shall cease to be members of the House of Lords and House of Commons respectively," had no bearing on the purely legal aspect of the question. Whether the 24th clause remained or did not remain in the Bill was entirely irrelevant to the question. The representation of Ireland in the Imperial Parliament has no more bearing on its

authority than the fact that Canada and Victoria are not represented in that Assembly.

The speech of Sir Henry James on Lord Hartington's motion for the rejection of the Bill attracted much attention in the House of Commons and in the country, and no doubt is one entitled to the most attentive consideration from the high position of the speaker in his profession, and from the consistent attitude which he has adopted in regard to the whole question. Sir Henry James said in reference to the conditions laid down by the Prime Minister that he would take the first and second of them—the unity of the Empire and the supremacy of Parliament—and these conditions, he said, were not fulfilled. "What," he continued, "does that unity, the unity of the Empire, mean, and from what source does it come? Unity by virtue of one crown being paramount over the three kingdoms is substantially no unity. There was no unity between Hanover and England when the crown of the two kingdoms was on one head. The real unity of a kingdom must depend upon the unity of its laws. I do not mean by that that there must be identity of laws. We have different laws now in England, Scotland, Ireland, and Wales, and if the efforts of some of my hon. friends should succeed, we shall have different laws in every county in England with respect to one social subject. What I mean is that there must be one power of making laws for a kingdom supposed to be united." He said

further that there was a junction of the crown before the Act of Union, but the union of the Empire was effected by the junction of the two Parliaments. There was no "United Kingdom of Great Britain and Ireland before the Act of Union; that Act was the only bond which made these kingdoms united kingdoms."*

So far as these passages refer to the fact that Hanover and England, though the monarch of each was the same, were not united, the statement is historically and legally true. Because, so far as external sovereignty was concerned, the two kingdoms were independent and separate. But in saying that there was no union of Great Britain and Ireland before the Act of Union, with every deference for the high authority of Sir Henry James, it must be said that the assertion is incorrect. If it is true, what becomes of the propositions of Coke and Blackstone, which I have cited above? How does Sir Henry James deal with the Act of George I.? How does he explain away the fact that it was the Court of St. James that was represented at every foreign court, and that the treaties made by the King of Great Britain bound, not only England and Scotland, but Ireland as well? His proposition is of course true in the sense that the King of Great Britain was not styled the King of the United Kingdom; but the true inference is not that Ireland was not a part of the British Empire, but that it was a *dependent* kingdom. Further,

* *Times*, May, 1886.

the right hon. gentleman asserted, after reciting the third article of the Act of Union, that the draughtsman who had to deal with the Bill must sooner or later schedule that clause as one that was to be repealed by this measure; and he asserts that Parliament is asked not to modify but to repeal that article. I am at a loss to see on what clause in the Bill that assertion is based. All that the article says is "that the said United Kingdom be represented by one and the same Parliament, to be styled the United Parliament of Great Britain and Ireland." The Bill of Mr. Gladstone does not say "That the said United Kingdom shall *not* be represented by one and the same Parliament." It is true that it says "After the appointed day the Irish members shall cease to attend;" but that clause does not make the remaining members cease to be "the Parliament of the United Kingdom of Great Britain and Ireland;" nor does it create any other Parliament to be styled the Parliament of the United Kingdom. Then Sir Henry James went on to say that "the moment that is done," namely, the modification of that article, "everything which constitutes the union between the two countries will be removed." This is, I submit, entirely erroneous. Is the common allegiance of Ireland and of Great Britain to the Queen to go for nothing? Are the extensive powers of legislation upon Imperial matters excepted from the powers of the new Parliament, things that would create no legal

bond between Ireland and Great Britain? Is the fact that the Queen, through the Lord-Lieutenant, acting upon instructions from time to time to be given upon the advice of the Ministers of the Crown might veto Irish Bills, of no legal consequence? Would the jurisdiction of the Judicial Committee of the Privy Council constitute no tie between the Government of Ireland and that of Great Britain?

"A sovereign Parliament," Sir Henry James said, "which is equivalent to a constitutional Parliament, must be subject to two conditions. Such a Parliament must always have the right to alter its own fundamental existence, and it must be able to alter and remodel its own constitution. Secondly, it must be subject to the control or decision of no man or body, so as to enable this man or body to say that the authority of Parliament has been exceeded. Those two conditions must exist in an Imperial Parliament such as we now have, with no written constitution; but having, as a writer on the Government benches has said, a flexible constitution, it can alter its own constitution." Well, are these conditions in any way affected by the proposed measure? In what way would the right of Parliament to alter its own fundamental existence and to alter and remodel its own constitution be affected by this Bill? What would there be to prevent the Imperial Parliament from extending the franchise in any way it might please, from imposing qualifications for membership, from enacting that the colonies should

have power to send members to it? The only clause on which Sir H. James relies as proof of his assertion in the passage just quoted is the 39th clause, to which I have already alluded. He said that if hon. members looked to clause 39 of the Bill, they would find that the sovereign Parliament would be the British Parliament; but that in order to exercise full sovereign rights it would have to call back a certain number of its members. "And now, sir," he says, "comes this question, which I venture with great deference to call the attention of the House to, that the British Parliament cannot alter its own constitution if this Bill becomes law without recalling the Irish members. The British Parliament alone would be powerless to alter its constitution. I submit that if that is done there is no man who dares to say here that there is power for the British Parliament to act in the absence of these Irish members. If it be contended that the Irish members are to have this Act repealed in their absence, and their right to a separate Parliament taken away without their consent, I think I can give good reason why that cannot be so. This Bill has been called a Treaty of Peace. Well, sir, in one sense it is almost a treaty; but dealing with it from a legal point of view we must call it a *legislative contract.* We have constant examples of contracts in the Statute Book, especially in relation to private Acts of Parliament. The Irish members say they are willing to leave this Parliament; they are joint tenants of this

Chamber at this moment, and are willing to give up their estate in this House; they go away on the terms that they shall legislate for themselves in Ireland, and that if we should ever wish to take the power away from them we should recall them here. Therefore we should not have the power to alter the constitution of this Chamber, so far as it is affected by this Bill, without calling these Irish members back. I will not now enter into refinements of the question whether we can legally do so or not. Whatever we do, a judge sitting in England or Scotland would have to obey us. If we took that course, the effect of it, from a mere legal aspect of the case, would have to be determined in Ireland by an Irish judge who would not be answerable to this Parliament, but only to Ireland, and who would say, 'You have repealed the Act which constituted the Irish Parliament. The Irish Parliament is passing good laws for Ireland; I will obey those laws: and you have no right to take away the powers of the Irish Parliament in the absence of their members.' Then we should have a conflict, and I believe that the Irish judge would be in the right, and that we should be in the wrong."

There are several things in this remarkable passage which call for attention. First, the mere fact that in order to exercise what Sir Henry James calls their "full sovereign rights," members of the Irish Parliament would have to be called back—would not abridge its sovereign rights, as we have seen above, for there

was nothing in the proposed clause to make the actual presence of the members so to be recalled necessary. At all events, all that clause 39 said was that a certain form should be gone through before any alteration of the Act could be made, but the performance of that form would be a matter entirely within the sphere of the will of the British Parliament, and if the members of the Irish Legislative body should not choose to comply with the requisition, the competency of the British Parliament would not be affected by their absence. The statement of Sir Henry James that the Bill took away from Parliament the power of altering its own constitution appears to me inaccurate, notwithstanding the very confident manner in which it was made. Even taking Sir H. James's view of the effect of the 39th clause as to Parliament's power of altering the Bill, it does not follow that the calling of Irish members to Westminster would, had the Bill passed, have been necessary for an alteration of the constitution of either House of Parliament which would not involve the modification of any clause of Mr. Gladstone's measure. Nor could the disfranchisement of Ireland by the operation of the 24th clause have done so. Many boroughs were disfranchised in 1884, and no one would contend that by the legislation of that year Parliament has precluded itself from further constitutional changes.

The "good reason" that Sir H. James gives for

denying the right of Parliament to repeal the Bill without the recall of the Irish members is one that must be thought a very bad reason by those who accept the notions of law and sovereignty now prevalent among English judges and jurists. "That Bill was," he said, "a legislative contract," and he referred to the existence of constant examples of such contracts in the Statute Book. No doubt there are many examples to be found of contracts between citizen and citizen ratified by Act of Parliament, but where does Sir Henry James find an example of any contract made between the High Court of Parliament and any subject, whether a mere person or a corporation? Later on, in the passage quoted above, the right hon. gentleman took a very remarkable view of the functions of an Irish judge. He says that "the Irish judge would not be responsible to Parliament but to Ireland." The meaning of this is not very obvious. Under the proposed scheme two of the judges of the Exchequer division of the High Court of Justice in Ireland would be liable to be removed only in the same way as the judges of the High Court of Justice in England, viz. by an address from both Houses of the Imperial Parliament. Those Irish judges would to that extent be responsible at any rate to those bodies. With regard to the other Irish judges, it is not easy to see what is meant from a legal point of view by their being responsible to Ireland. In a vague sense, referring rather to their moral obligations than

their legal duties, Sir Henry James may be right in saying that they will be so responsible. As a matter of fact, they would hold their office from the Queen, subject to section 27 of the proposed measure, until that section might be altered by the Imperial Parliament. That section proposed to enact that the judges in Ireland should only be removable in pursuance of an address to her Majesty from both orders of the legislative body, voting separately, that is to say, at the request of both orders of the Legislature and with the consent of her Majesty, acting upon the advice of her responsible Imperial Ministers.* The duty of an Irish judge under the proposed scheme would be just what it is now—to administer justice according to law, and of that law the Imperial Parliament would still, as we have seen, be the supreme source. Sir H. James assumes there must be a conflict, and that an Irish judge would follow the Acts of the Legislature of Ireland rather than those of the sovereign Legislature of the United Kingdom; and he also says that if a judge did so he would be in the right. It is not very clear whether Sir H. James meant that a judge so acting would be morally right. If he deliberately refused to be bound by an Act of the Imperial Parliament made applicable to Ireland he would be intentionally breaking the conditions on which he holds his office; and it is not very easy to imagine a case in which he could be said to be morally

* *V. infra* p. 56 as to this.

right under such circumstances. In any case, any one aggrieved would, according to the proposed scheme, have an appeal to the Judicial Committee; * but I cannot see why it should be assumed that Irish judges, any more than colonial or other judges, will at all times and on every occasion be ready to allow political considerations to sway their minds and to become the subservient tools of party politicians.

§ 4. The Proposed Executive.

Assuming, then, that in accordance with these principles the Bill would not have taken away the legal sovereignty of the Imperial Parliament, let us see what, according to its provisions, would have been the form and powers of the Irish executive, and try to determine the extent and nature of the constitutional change which would have been effected.

By section 7 of the Bill it was provided as follows: —"The Executive Government of Ireland shall continue vested in her Majesty, and shall be carried on by the Lord-Lieutenant on behalf of her Majesty, with the aid of such officers and such council as to her Majesty may from time to time seem fit." And by sub-section 2 of the same section it was proposed that, "Subject to any instructions which may from time to time be given by her Majesty, the Lord-

* *V.* § 25 of the Bill.

Lieutenant shall give or withhold the assent of her Majesty to bills passed by the Irish legislative body, and shall exercise the prerogatives of her Majesty in respect of the summoning, proroguing, and dissolving of the Irish legislative body, and any prerogatives the right of which may be delegated to him by her Majesty." This section was placed in the Bill under the heading "Executive Authority," but in order to understand its operation it is not only necessary to refer to other sections of the Bill, but to bear in mind the existing laws in force in Ireland, which are kept alive by section 38, and the fact that all existing courts of civil and criminal jurisdiction, and all existing legal commissions, powers, and authorities, and all existing officers, judicial, administrative, and ministerial, were by the said section to continue as if the Act had not been passed. We must remember too that under our existing arrangements certain usages, certain political understandings, or, to use Professor Dicey's term, "the conventions of the Constitution," are every day put into force. By section 34 of the proposed Bill it was provided that the privileges, immunities, and powers of the Irish legislative body were to be defined by that body itself, so that, however, the same should never exceed those at the time of the passing of the Act enjoyed and exercised by the House of Commons and its members; and that the existing parliamentary law, save so far as it might be altered by the Irish legislative body, was to be

applicable to it. The Bill contained nothing to prevent the executive officers to be appointed under section 7, or the members of the council therein referred to, from being members of the Legislature; and the general intention to be inferred from the Bill is that the proposed executive government of Ireland (except so far as the powers of government are reserved to the Imperial Parliament or the Imperial executive), would be exercised through ministers responsible to the Irish Legislature in a manner analogous to that in which the administration is carried on in colonies possessing what is called responsible government.

The determination of the powers and functions of the Irish Ministers seems under this scheme to be left to the legislative body of Ireland. That body, of course, might determine that the executive officers or ministers should not be qualified to sit therein, just as by section 6 of article 1 of the Federal Constitution of the United States, no person holding any office under the United States shall be a member of either House during his continuance in office. With the consent of the Lord-Lieutenant they might make the relations between the legislative authority and the executive authority in Ireland as nearly similar as possible to those existing between the Senate and the House of Representatives in the United States and the Federal Government.

There is, indeed, much to be said for the complete separation of the Legislature and the members of the

executive authority in any suggested constitution. The continual encroachment of the House of Commons, by means of questions addressed to Ministers and by motions, on the domain of the executive, may seriously raise the question whether, in regard to some of the departments of State there ought not to be a change in our own arrangements. We are apt to forget under what peculiar and exceptional conditions an executive, all the chief members of which are liable to be changed as a consequence of a division of the popular House on a question involving probably only one department, or, perhaps, simply some change in private law, has been able to discharge its duties with the measure of success which it has attained. The difficulty of devising any plan analogous to the American method, so long as the Lord-Lieutenant is appointed by the Crown, is considerable; for it must be remembered that the President of the United States derives his power from election.

But it may be taken as practically certain that any scheme on the lines of the Bill in question would result in the creation of a Ministry responsible to the Irish Legislature in the same way as the Ministers of Victoria or Canada are responsible to the Legislatures of those colonies. What would be the position of such an Irish Ministry in regard to the Imperial executive? It seems to be assumed by many of the opponents of the Bill that the Lord-Lieutenant would be in a precisely

similar position to the Irish Cabinet as the Sovereign, according to current theories, is to the English Cabinet; but this appears to be inaccurate. The position of the Lord-Lieutenant was dealt with in section 26 of the Bill, and it was there provided that his salary should be charged on the Consolidated Fund of the United Kingdom, and that the expenses of his household and establishment should continue to be defrayed out of moneys to be provided by Parliament; and also that the existing powers vested by Act of Parliament or otherwise in the Chief Secretary for Ireland might, if no such officer be appointed, be exercised by the Lord-Lieutenant until other provisions should be made by Act of the Irish Legislature; and further, that the Legislature of Ireland should not pass any Act relating to the office or functions of the Lord-Lieutenant of Ireland. There was nothing in the Bill to alter the status or diminish the powers of the Lord-Lieutenant; no section varied his position in regard to the Sovereign, or in regard to any of the departments of the English executive. So far as the clauses of the Bill were concerned, he might occupy a seat in any future Imperial Cabinet. But in moving for leave to bring in the Bill, Mr. Gladstone said that "he"—the Lord-Lieutenant—"would not be the representative of a party. He would not quit office with the outgoing Government." He would therefore, according to the scheme, be a Viceroy in a position analogous to that of the Viceroy of India and a Governor-General

of Canada; and his powers would depend on the commission issued to him. According to the usage of the Constitution, all instructions from the Queen to him would have to be sent through one of the great executive departments, and on the responsibility of one of the Ministers—probably the Prime Minister. It is perfectly true that the Prime Minister, whether he be First Lord of the Treasury, or Foreign Secretary, or Lord President of the Council, might have no legal right to dictate to the Lord-Lieutenant what his course should be in regard to any matters in which, as the servant of the Queen, he would possess discretionary power. But the same observation is true of the relations between the Prime Minister and the English Secretary of State for the Home Department, or any of the other Secretaries of State. The power, such as it is, of the Prime Minister over his Cabinet is not a power given to him directly by law, but it is possessed by him with the indirect sanction of the law, through his control of the House of Commons, and through the maxims or usages of the Constitution. The sanction or force of these maxims or usages consists in this, that if any minister disregards them his position ultimately becomes untenable, because to hold it he will have to violate some rule of law, and any such violation of the law will subject him to its ordinary penal ties; or, if this is inadequate or inapplicable, to impeachment by the House of Commons.

This position of the Lord-Lieutenant, as an officer under the immediate control of the English Cabinet, would be of great importance in the preservation of the actual sovereignty of the Imperial Government. His powers under the Bill proposed would be very extensive. He would have a veto upon every Bill of the Irish legislative body, and he would be bound to use that veto in accordance with the instructions of the Imperial Cabinet, and if he were to disobey their instructions he would be responsible to them and to the Imperial Parliament; for by section 7, sub-section 2 of the Bill, it was provided that he should exercise the veto subject to any instructions which might from time to time be given by her Majesty. Now it is one of the commonplaces of constitutional practice that the Queen can only act upon the advice of some responsible Minister, and therefore the instructions referred to in the sub-section just cited must be instructions given upon the responsibility of some Minister, whether the First Lord of the Treasury or the Colonial Secretary.

Under this scheme, then, the position of the Lord-Lieutenant would be very like that of a Colonial Governor. His relations to the Irish Cabinet would be much the same as those of a Governor to a Colonial Ministry. Probably the actual influence of the Crown confidentially exercised over the Imperial Cabinet is greater than is popularly supposed; but certainly the power which can be exercised by a Colonial Governor

of ability and tact over a Colonial Ministry is very real and considerable.*

Let us consider next what would be the position of the Lord-Lieutenant in regard to those armed forces upon which in case of insurrection any Government has to rely. By section 3, sub-section 3, of the Bill, the Legislature of Ireland was precluded from making any laws relating to the army, navy, militia, volunteers, or other military or naval forces. Consequently the Irish executive could not obtain any authority from the Irish Legislature to create any force subject to such regulations as are absolutely necessary for the government of the army. Even the continuance of the Royal Irish Constabulary, or of a force similar to it, would be beyond the competence of that body. No Mutiny Act could be legally passed. The Imperial Executive would, therefore, according to the Bill, either through the Lord-Lieutenant or not as it may please, control the numbers and the distribution of any military force which it may be deemed expedient to maintain in Ireland. By section 21, sub-section B, of the Bill, the Royal Irish Constabulary, which is to all intents and purposes an army, was to "continue and be subject as heretofore to the control of the Lord-Lieutenant, as representing her Majesty." Though the construction of this sub-section is not quite clear, it is submitted that it would be found that in the

* See as to this, Mr. Todd's "Parliamentary Government in the British Colonies," c. 5.

direction and use of this force the Lord-Lieutenant would in no wise be subject to the control of the Irish Ministry as to it, but to the control of the English Cabinet. The only police forces which could be created in Ireland would be purely local bodies and under the control of local authorities. It follows then, from the consideration of the scheme, that the only organised armed forces that could lawfully exist in Ireland would be subject, not to the discretion of Ministers answerable to the Legislature of Ireland, but to the Lord-Lieutenant or other officer whom the British Ministry might appoint.

The conclusion therefore to be drawn from the consideration of this Bill, in the light of what has been before said, is that the control of the English Cabinet over Irish affairs—so far, that is, as they are matters of Imperial concern—would not be sensibly diminished by the changes which would take place should this Bill become law.

§ 5. The Proposed Judicial Authority.

There is one other function of sovereignty which in the consideration of any scheme of Irish government has to be taken into account, and that is the position of the judicial authority. In England the separation between the judicial and the executive power is toler-

ably complete, though it has yet to be proved how far the existing laws in regard to the matter would stand the test of very embittered party action, or determined attempts on the part of a large section of the population to resist the ordinary course of judicial decrees. The judges of England, since the Bill of Rights, hold their offices during good behaviour, and are only removable upon the address of both Houses of Parliament. Now, by the Bill in question a similar provision was made by section 27 in reference to judges in Ireland; but it was provided that with regard to one division of the High Court of Justice, viz. the Exchequer Division, that it was to continue a Court of Exchequer for revenue purposes, and that when any vacancy occurred in the office of any judge of such division, his successor was to be appointed by her Majesty, on the joint recommendation of the Lord-Lieutenant of Ireland and the Lord Chancellor of England. The effect of these provisions would be that the Irish Legislature would, in determining how the government of Ireland should be carried on, create some office answering to a Ministry of Justice, in which all the business transacted by the Lord High Chancellor of Ireland and the other business pertaining to the organisation of the judicial authority would be transacted, and that the appointment of the Irish judges (except those of the Exchequer Division) would take place upon the recommendation of the Minister of Justice. But upon their appointment the

judges would not be responsible to the executive Government, either individually or collectively, but would only be removable upon an address to her Majesty from both orders of the Legislature; and it is to be observed that even if both orders of the Legislature should coincide in asking for the removal of a judge, that the consent of her Majesty would also be required. This power of consenting to or refusing the removal of a judge is no doubt one of the prerogatives the exercise of which might be delegated to the Lord-Lieutenant by her Majesty. If it is not so delegated, then the effect would appear to be this—the consent of the Queen to the removal of an Irish judge would have to be given through and by one of the members of the Imperial Cabinet. If it should be delegated, it would no doubt be contended that the Lord-Lieutenant would be bound to accept the advice of the Irish Ministry in regard to giving or withholding his consent to the removal of a judge. If, however, this prerogative be not delegated, the independence of the Irish Bench of the control of the Irish Ministry would be secured.

The most remarkable provision of the Bill as to the judicial authority was, however, that giving jurisdiction to the Judicial Committee of the Privy Council. * The practical subordination of the Irish Courts, and indeed the Irish Legislature, in case of any dispute as to the validity of Irish statutes, secured by the scheme

* See the 25th clause, providing for the decision of constitutional questions.

of Mr. Gladstone, has not received the attention which its importance warrants.

We have now briefly considered the nature of the executive and judicial authorities for the Government of Ireland which would have resulted from the passing of this Bill.

It might, perhaps, be urged that the Bill is defective because it did not more specifically and completely deal with and define the relations between the English and Irish executives, and those between officers or ministers of the Irish executive and the Lord-Lieutenant, as representing the Queen in Council. The answer to such criticism is that the Constitution of England itself is not a written Constitution; that the laws of this country have never been completely expressed in any code or Acts of Parliament; and that it would be almost impossible to create a constitutional code for Ireland without at the same time entering on the almost insuperable task of doing the same for Great Britain. The fact is, that the English Constitution has grown, and has not been made, and it would be difficult, if not impossible, to write down what is the British Constitution at the present moment. "En Angleterre," said an acute observer of politics, "la constitution peut changer sans cesse; ou plutôt elle n'existe pas." Though the latter part of De Tocqueville's remark is not accurate from the lawyer's point of view—for the law does exist, and is ascertainable by the competent prac-

titioner in most cases with reasonable certainty—yet the observation is substantially just, for the practical working of the political machine depends on many rules by which men allow themselves to be guided which are not rules of law recognised in the courts.

§ 6. The Actual Effect of the Proposed Scheme.

Such being the effect of the suggested scheme of Irish government from the purely legal point of view, we have to consider next whether it or any similar plan would diminish that control of Ireland, that effectiveness of sovereignty which, as has been shown above, is necessary to complete the true conception of a united empire.

It will be remembered that the very first condition of effective imperial supremacy is the maintenance of law and order in every province; and that where the form of government is democratic the creation of the law-abiding character on which the maintenance of law and order depend is only possible under at any rate the three conditions mentioned above.

In Ireland at the present time it is only too clear that the law is obeyed and respected only by a small proportion of the people. The existing government and the existing body of rulers are out of harmony with the views of the bulk of the community. The English laws are not deemed just; the Imperial Parliament, which is the source of their authority,

does not command the confidence of the Irish people; and the executive and judicial officers are looked on as the servants of a hostile power. The very consequences which, in the more general consideration of the question above, I ventured to anticipate from a disregard of these conditions, have been found to happen in Ireland. Widespread disaffection to English rule, hatred for the officers of the law, contempt for the decisions of the courts, the use of fraudulent means for controlling the verdicts of juries, and general disorder are proved every day to exist in a large part of the country.

This state of things is said to be due to the terrorism of the National League. To assert this is, however, only to carry the problem a step further back, and not to afford any real explanation. We are told that the National League has two phases of existence—one an overt phase as a lawful combination of voters for party purposes; another a secret phase as a powerful organisation, performing in the dark most of the functions of sovereignty, trying and passing sentences on members and non-members, making rules for the conduct of life, and enforcing its decrees partly by a system of "boycotting" not easily to be suppressed by authority, and partly by bold defiance of the criminal law. We are informed that it is a society analogous to those which have existed, and are alleged to exist, on the Continent for overthrowing the whole organisation of modern society.

Assuming that the picture is not overdrawn, one cannot help remarking in the first place that the existence of such a body implies political capacity of a high order in the Irish mind; and that a wise statesman must be filled with regret at the misdirection of such constructive power on the part of its leaders and of such a faculty for co-operation and subordination on the part of its members. In the next place one notices that the relations between the governing body of such a League and its members or those who are controlled by it, are precisely such as are found, when the three conditions I have mentioned are fulfilled, to subsist between a regular government and its subjects. The decrees of the National League are according to the moral standard of those they control substantially just; the governing body commands the confidence of its members; and its officers are their friends and not their foes. To say its influence is due to "terrorism" is a very inadequate explanation of its power. Individuals here and there may be moved to obey it by fear alone; but that the majority of a community can be coerced into obeying a secret society by the "terror" created by a few individuals is impossible in a country where a regular government assisted by a constabulary and an army has long existed. The power of such a society must be derived from the sympathy of the larger part of the people.

There is nothing to show that the Irish mind has

not, or at any rate had not, just as much reverence for authority and law as the Teutonic mind; but it has never been brought into the proper relation to English ideas of political organisation. I have sketched above the legal view of the relations of the English Government and Ireland; but the theory of the English lawyer has never fitted the facts. The truth is that a progressive race, the development of which had proceeded to a point further than that attained by the Celtic people of Ireland, led by men of another race singularly gifted for political adventure, were brought into contact with men who were still organised on a tribal basis, and who ruled their lives by customs to which they were passionately attached. The conquerors were strong enough to break up the existing social organisation; but they did not succeed and have not yet succeeded in bringing the Irish people within the bounds of their own conceptions of government and law and property. In the case of Wales the English conquest has been complete and fairly successful. This would appear to be due partly to the fact that the Celtic tribes in Wales were fewer and smaller in numbers than those of Ireland and were nearer to the centre of authority, and partly to the fact that at the time of such subjugation the customs of the Welsh people, if we may trust the evidence of the ancient Welsh laws, were more like those which prevailed in the English counties than the Brehon laws and Irish customs were—whether this was due to the

adoption of Saxon customs by the Welsh tribes or to their having themselves reached a stage of social development not very far removed from that of the Anglo-Saxon inhabitants of the rest of the island. These considerations seem to me to point out what is the real root of the Irish difficulty. Its solution can only be found in bringing the Irish people into harmony with government and law. The scheme of government which Mr. Gladstone has proposed would, if indeed any scheme would, produce this result, because it will be found to comply with the three conditions laid down above. To demand such a reform as will suddenly create in Ireland a community of citizens in whom the law-abiding spirit is so marked as in that of England is to ask what is impossible, and to reject this scheme because it will not put an end to all difficulties in Ireland is absurd. Diseases of long standing cannot be cured in a day; the growth of a new national character is as slow as the evolution of a new animal type. There will be in any case struggles and dissensions and disappointment; but in the adoption of some such scheme as Mr. Gladstone's lies the only hope of forming a stable government in Ireland able to maintain law and order, and to produce that security which is the primary condition of national content and prosperity.

Assuming then that the adoption of such a Bill would result in the formation of a subordinate Irish Government able to restore order and to make the

administration of justice efficient, the first condition on which the reality of the Imperial sovereignty depends will be performed. It remains for us to ask whether the relations between the proposed Irish Government and the Imperial Government would be such as to diminish the power of the latter as to affairs concerning the whole Empire. It has been shown that as to legal theory the proposed Government in discharging each function of sovereignty would be distinctly subordinate; but what, in fact, would be the position if there should be a conflict? The opponents of Home Rule seem often to assume that when any dispute might arise, the proposed Irish Government would carry on the struggle in defiance of law and their own interests to the very end. Looking at the matter impartially one fails to see any justification for such a forecast of history. The possible disputes, so long as they are kept within the law, and there is no open rebellion, must be between the Lord-Lieutenant as representing the Imperial Cabinet and the Irish Ministry in regard to matters affecting the whole Irish Cabinet, such as the dissolution of the Irish Legislature, or the vetoing of a Bill, or in regard to the matters of some one department. Such disputes, from the nature of things, must happen. They, no doubt, require high qualities of tact and temper for their settlement; but what is there to make it likely that an Irish Government would be wholly impracticable? There is another kind of conflict which might

arise—a question as to the validity of an Act of the Irish Legislature. Such a question would be settled in the ordinary Courts, or if necessary by the Judicial Committee of the Privy Council. Why should it be assumed as a matter of course that the decrees of this appellate Court would not be obeyed in Ireland as implicitly and regularly as in the colonies? The truer inference from the facts of human nature and from experience is that the Ministers and Judges, and members of the legislative body of Ireland would be too interested in the then existing order of things to be anxious to resort to extreme measures; and having regard to the large sphere of legislation open to the Irish Legislature, the people would also be very largely interested, for the majority would be able to bring the Irish laws into accordance with their wishes, and moreover practically secure that the Ministers they desire should hold office.

But if it is assumed that all the ministers and all the judges and all the subordinate officers of the Irish Government, with the assent of the majority of the population, combine to disobey the law, then no doubt the Imperial Government would have to resort to the sword. A similar observation is, however, applicable to any English county. The Marquis of Hartington in a recent speech said, "I shall be happy to know what is the exact executive machinery by which my right hon. friend thinks that the will of the sovereign Imperial Parliament would be

enforced in Ireland if this law passes in case of any conflict of the nation with the domestic legislature." Lord Hartington might as well have asked what would be the exact executive machinery by which Mr. Gladstone would enforce the law in case all the executive and judicial officers of the County Palatine of Lancaster, and all the town councillors and officers of the municipal boroughs and local authorities in that county and the bulk of its inhabitants were to decline to obey an Act of Parliament. It is not very easy to see what could be done in such a case, except to make use of the army. The argument, in fact, proves a great deal too much. The difficulty Mr. Gladstone would feel in answering the question put is not a difficulty caused by the proposed Bill, should it pass, nor a difficulty peculiar to Ireland, but a difficulty incident to all government. The fact is, that both the present system of governing Ireland and the proposed system are founded upon the idea that the Irish people are qualified for self-government; that they are amenable to reason, and that they, like the great mass of mankind, will under fair conditions organise themselves for common action and a common purpose—the protection of life and property against the selfishness of individuals and the other objects to be attained by political action.

Mr. Chamberlain, in addressing the inaugural meeting of the National Radical Union, said, "We think that the powers which are to be conceded to these

local authorities (*id est*, the Irish local authorities, to whom powers are to be delegated) should be strictly defined and limited, and that some means of preventing the improper exercise by the new authority of the powers which are granted to it should be secured less extreme, less violent, than the employment of arms in order to reconquer a practically independent country, which seems to be a result some of the members of the Government regard with a light heart, as the ultimate consequence of that policy they are pursuing." I confess myself at a loss to understand to what means Mr. Chamberlain can allude. Let us take the ordinary means of enforcing any duty which is imposed upon a citizen. Suppose, for instance, a burgess of Birmingham were to refuse to pay a duly imposed tax. It would be found means are given by law for the recovery of the tax; and that if, after the judgment of the tribunal before which the defaulting burgess had been brought, the order of the Court were not obeyed, means are provided for enforcing it. In ninety-nine cases out of a hundred the order of the Court would be complied with, or else in the operation described as "the law taking its course," would be performed in regard to the defendant, without the employment of armed force. The reason for this quiet enforcement of the law is that the vast majority of the people of Birmingham and the executive officers of the town and of the county of Warwick are willing and wishful that the law should

be obeyed. But suppose that were not so: that the town council of Birmingham were to throw off the yoke of Parliament; suppose it were to declare Birmingham a free and independent Republic; that the Imperial Parliament had no power to levy taxes on the inhabitants of Birmingham, suppose it repudiated the authority of all courts of justice, except such as it itself established; and suppose that all its officers and the bulk of the able-bodied inhabitants of Birmingham were to assent to and support its action; and that the resolutions of the Town Council were carried into effect by its agents—what are the means of preventing so improper an exercise of the strictly defined and limited powers of the Corporation of Birmingham, which Mr. Chamberlain would exercise, supposing he were Prime Minister, that were "less extreme, less violent," than the exercise of an armed force? Indeed, if the proposed new government of Ireland had simply the powers of a municipal corporation, the only means of really stopping an improper exercise of its power would be to resort to armed force if it were supported by all its officers and the people generally. Seeing that, according to the scheme of Mr. Gladstone, the army would remain under Imperial control, and all the arrangements in connection with it would be outside the scope of the Irish Ministry's power, it cannot be seriously contended that any more substantial danger of successful revolt would exist than at present, and it is not needful to discuss the issue of declared civil war.

But though the argument against the effectiveness of the Imperial control as put by Lord Hartington and Mr. Chamberlain proves too much, and is not only an objection to this scheme or any alternative scheme, but to all government, the fears they entertain may be presented in a form which avoids this retort. It may be alleged that the result of the plan would be to make Ireland a self-governing colony like Victoria, that the bond which unites us to our colonies is so slender as to bear no strain, that its existence is due to colonial forbearance and to the fact that the colonies are not actuated by the spirit of nationality on which Irish claims are based, that the moment an Irish Government on the proposed lines is created all its efforts will be devoted to obtaining absolute independence of Great Britain, that it is really in effect handing over Ireland to the control of men actuated by motives of such hatred towards England that they will not rest till they have inflicted a terrible blow to the Empire by the separation of Ireland and the setting up of an inimical sovereign state close to this country.

The first comment to be made on such an argument is that it underrates the strength of the connection of the Imperial Government with the colonies. In fact, without threats or violence, the supremacy of Parliament over the colonies is a very real thing. Mr. Chamberlain indeed recently referred to it as "an interesting constitutional thesis;" and such a statement, coming from a man who has been in two cabinets

cannot but have some weight from the peculiar facilities for forming an opinion that his position has given him. But the conclusion that facts known to all the world enable one to form is certainly different. For instance it will be found that during the reign of the present Queen over fifty statutes relating to the colonies in general have been passed by the Imperial Parliament,* and not one of these statutes can be altered or repealed by any colonial legislative body; and besides these numerous Acts have been passed extending to particular colonies.†

The occasions on which the veto of the Cabinet in London have been directly exercised have been few, but the power of the Crown has been used whenever it was necessary or expedient without any practical inconvenience. Passing from the legislative to the executive department, one who has not had Mr. Chamberlain's exceptional opportunities can only say that so far as an opinion may properly be formed from published documents, the relations between the Colonial Minister and the self-governing colonies have distinctly improved, though the Secretary of State has not been slow to intervene where Imperial interests were in question; and probably it would not be too rash to say that any representations from the Colonial Office as to

* Tarring, "Law relating to the Colonies," p. 79.

† By the Statute 28 & 29 Vict. c. 63, s. 2, any colonial law repugnant to an Act of Parliament extending to the colony to which such law may relate shall, to the extent of such repugnancy, be and remain absolutely void and inoperative.

what the safety of the Empire required on any occasion would be received and followed now with far more respect and prompitude than they would have been forty or fifty years ago, before responsible government was conceded.

And it is, moreover, worth noticing that in the week before that in which these pages were written the Judicial Committee on one day gave judgment in five cases affecting both public and private rights in India, Australia, Cape Colony, and the North American colonies;* and the decisions in those cases will be enforced in those distant regions without any greater murmuring than may be heard from defeated litigants at the Royal Courts of Justice, and with as much ease and certainty as the decree of any court in England.

Again, the argument that is sketched above clearly rests on the belief that the national sentiment of Ireland will not be satisfied with anything less than separation from the British Empire. Such an assumption does not appear to be warranted by the nature of the agitation that has been and is being carried on, or by any circumstances showing that the supposed interests of Ireland will require a serious demand for complete independence. If the assertion of the principle of nationality in Ireland had been accompanied by attachment to some deposed dynasty of princes or by aspirations for a republican form of government, there would be no doubt reason to believe that the

* *Law Times*, July 3, 1886, p. 168.

concession of self-government would lead to demands involving the breaking up of the Empire. But one of the most singular things that are to be observed about the Irish movement is that no attack has been made on the Crown; and there is indeed some evidence that the personal popularity and influence of our present Queen is as great even in the disturbed parts of Ireland as in England. No pretender to an Irish kingdom now fawns on a royal enemy of the Hanoverian dynasty, or sulks on the outskirts of society in any European capital. Nor, on the other hand, has this agitation become mixed up with the socialistic dreams or republican hopes with which the propagandism of the rights of oppressed nations has often become associated on the Continent.

There is in fact good ground for thinking that the bulk of the Nationalist party in Ireland will be satisfied with the concession of self-government. The power of the Catholic Church, which is so much insisted on, is far more likely to be exercised against separatist tendencies, than in favour of attempts to make Ireland an independent state under the only form of government under the circumstances possible —the Republican. Its influence is generally Conservative, and the support that it has given to the Nationalist party is due to the need of conciliating the peasantry, and the hope of improving its position in case Home Rule is granted, than to any hostility to the Empire as a whole. The leaders of that Church

see clearly enough that if Ireland were made an independent republic, a rapid spread of secularist ideas antagonistic to its dogmas and organisation would be the result; and it is not therefore unreasonable to infer that they would exert their power against any attempt to bring about separation.

Again, one of the first consequences of the establishment of an Irish Government on the proposed lines would be the formation of political parties. The Nationalist party, which now presents a united front to the British Legislature, would be found to be divided. The "spoils of office" would not be inconsiderable, and limited though it would be, the field of possible legislation at Dublin would be broad enough for very considerable division of opinion and parliamentary conflict. The minority, whose interests are so often insisted on, and by whom are meant the larger landowners and capitalists (generally Protestant) would have to combine for their own protection, and it would probably be found that they would be reinforced from the now united ranks of Mr. Parnell's followers or those who succeed them; and the result would probably be that the Irish electors and the members of the legislative body would group themselves around leaders favourable or unfavourable to some programme of legislative changes. The struggles that would thus ensue in regard to Irish affairs would absorb the political energies of the people, and their attention, and that of their leaders, would be diverted

from a hopeless attempt to break the connection with the Empire to other matters of local concern. It is indeed very likely that a few extreme men, embittered by their own past and made fanatical in their hatred of England by prolonged strife, might not at once acquiesce in the new arrangements; but there is every ground for believing that the men who have come to the front are sensible enough to devote themselves to the improvement of their country under the conditions which they themselves have accepted. Besides it must not be forgotten that if a Parliament such as is suggested were established at Dublin, a better class of politicians than those on whom the Irish leaders have been forced by the necessities of the case to rely would become members of it, and seek in public life an honourable career.

The assertion often made, that to give Home Rule on any scale large enough to be acceptable to the Nationalists would be to hand over Ireland to the enemies of England, means, it is presumed, that a large number of Irish-Americans would thereupon come over to Dublin and obtain a controlling power over the Legislature and Ministry of Ireland. The lessons of history give no countenance to this statement. The picture of the Irish-American dynamitard, for instance, as drawn by the Tory journalist is only a reproduction of the Italian conspirator of Leicester Square as formerly portrayed on the Continent. The irritation openly expressed by many in this country

against the United States for not altering their laws in order to expel or imprison the Irish agitators of New York, is strictly analogous to the angry feelings felt in the society of Vienna in regard to our own Government for allowing London to become the home of the Italian refugee. When the moment of Italian triumph came the London conspirator vanished, and when Home Rule is given to Ireland the Irish-American plotter will disappear. A national movement of the kind in question often attracts to it unselfish fanatics and unprincipled adventurers. The fanatic descends to evil deeds because he loses his self-control, and the adventurer is glad to shelter his wickedness under the goodness of the cause; when victory comes both are forgotten. This Irish agitation will probably be no exception to the rule; and those who will obtain the confidence of the Irish people, when it is successful will not be the Irishmen of New York.

The conclusion to which these considerations point is that the large measure of self-government which would be conferred by Mr. Gladstone's proposals would result in the gradual creation of a law-abiding national character in Ireland, and the formation of a Government as strong and wise as is possible under democratic institutions, and that the real control of the Imperial Government would be thereby increased. It is frankly conceded that these hopes are founded on a favourable view of the potentialities of the Irish character. But it is also urged that

if they are falsified the position of England is not materially weakened. If the Nationalist demands should be persisted in, if the point should be reached at which the patience of British statesmanship is exhausted, and the only resource is an appeal to arms, the arrangements under Mr. Gladstone's scheme are such as to make our success a foregone conclusion.

§ 7. The Exclusion of the Irish Members.

No part of the Bill of Mr. Gladstone has excited more general discussion than the provision of section 24 for the exclusion of the Irish members from the Imperial Parliament. Upon the principles laid down above, this section would in no wise affect the legal position of Parliament; and its importance, as bearing on the future relations of Ireland with the Empire, if it should become law, appears to be much exaggerated. The cessation of Irish representation as it now exists in the Imperial Parliament is the natural consequence of the creation of an Irish Government of the colonial type; for that Parliament, while sovereign for the Empire, is also the domestic Legislature of Great Britain, and the retention of Irish representation in any form must give rise to great, though not perhaps insuperable, difficulties. Assuming the Bill to pass, with the 24th section simply omitted and all absolutely necessary changes in the language of the

Bill made, the following are some of the anomalies and inconveniences which would arise:—

(I.) The Irish members would be entitled to take part in legislating on purely English, Scotch, and Welsh affairs.

(II.) The Irish members would inevitably form opinions and take sides on matters in dispute in the Irish legislative body; and the parties thus formed would probably insist on fighting out these matters at Westminster as well as Dublin.

(III.) Some Irish members would constantly endeavour to criticise the acts of the Irish Ministry in power for the time being, and the conduct of the Lord-Lieutenant on matters arising out of his relation to that Ministry, in order that party capital might be made out of the debates they might manage to provoke.

(IV.) The temptation to English parties to bargain for the votes of Irish members on English issues would probably be too strong to be resisted, and to secure these votes the interference of the English Cabinet in questions which might be wholly settled at Dublin would be induced, and the settlement of Irish affairs be made more difficult.

(V.) The evils of the excitement of double elections would be great, and their expense an unbearable burden to Ireland.

(VI.) The strength of the Irish legislative body would be seriously diminished, and its importance as the source of law in the eyes of the Irish voters

lessened ; for it would not be possible to secure the attendance of one hundred and three competent Irish representatives at Westminster without seriously reducing the number of fit members of the Dublin Legislature, and probably some of the men best qualified to sit in the latter body would prefer to come to the House of Commons.

On the other hand, if Irish representation entirely ceased, it is said that Ireland would lose all voice in regard to the sphere of legislation reserved to the Imperial Parliament and all control over the general affairs of the Empire. To this the reply is that the Irish members accept this loss with equanimity; that the condition of Ireland is such that her interests must and ought for years to be absorbed with her own local concerns; that the wishes of the Irish people would necessarily be taken into account by the English Cabinet in determining Imperial policy, and could always be ascertained with sufficient accuracy on the responsibility of the Dublin Cabinet; and that Ireland would be in no worse position than the colonies.

Again, it is urged that the retention of legislation as to customs and excise by the Imperial Parliament, and the collection of duties of that kind on its authority, infringe the principle that taxation and representation should go together. It must be admitted that principle is not adhered to by the proposed Bill. But the seriousness of the infraction is much diminished by the fact that the taxation

would be indirect and in the form least overt and oppressive; that the taxes in question are imposed by acts permanent in the sense that they are not re-enacted every year; * that the liability would be in the nature of a fixed charge on Ireland, the continuance of which was one of the conditions of the grant of Home Rule and the justice of which could not therefore be fairly disputed by any Irish Ministry. That some politicians might try to make a grievance of it is very likely, but whether the bulk of the Irish people would think it worth while to sustain them in their objections depends on much the same conditions as the question briefly discussed above of the permanency of a demand for independence. The probability is that Irish leaders would find it to their advantage to abstain from raising any cry about the matter; and even if they did not so abstain, a firm attitude on the part of the Imperial Government would be an answer the Irish Government would be forced to accept, unless they were willing to proceed into a hopeless struggle. It must not be forgotten too, that though the principle "that taxation and representation should go together," is as a rule sound, it has no necessary application to the relations of an Imperial and subordinate Government; and it is probable that if a federation of the British Empire is accomplished, its financial basis may rest on contributions in proportions levied by the federal administration on each state of the Union,

* See Customs Tariff Act, 1876. Stephen's Comm. ii. pp. 565 *et seq.*

settled by agreement, which a federal legislature might not have power to alter, and which might not depend on representation at all.

The argument that the loss of the right of sending members to the Imperial Parliament involves the degradation of Ireland, is one that finds little response from Irishmen, as the followers of Mr. Parnell clearly understand. To Englishmen of enlightened minds, with a knowledge of the past, the idea that they are directly assisting in the government of a vast empire surrounds the electoral franchise with a traditional halo, and to them the eloquent passage in which Dr. Dale urges the value of the privilege* would doubtless forcibly appeal, but not to the majority of the Irish voters. Indeed, to come nearer home, no one who knows Wales well will doubt that if a Welsh Parliament were offered to it in terms similar to those offered to Ireland, the majority of the Welsh voters would accept it, not so much because they undervalue the substantial advantages of connection with the Empire, but because they would regard the loss of such influence as twenty-eight or thirty members can exercise over Imperial affairs as a less evil than the continued neglect of their special legislative needs.

Upon the whole then, if the only alternatives are the complete cessation of Irish representation at Westminster, or the continuance of such representation in its present form, and if any proposed "Home Rule" is so

* *Contemporary Review*, June, 1886.

constituted as to give rise to responsible government, it is tolerably clear that the former would be the less objectionable course. One cannot help thinking that the excessive importance attached to the 24th clause has been due to the fallacy that the continued presence of Irish representatives is essential to the legal supremacy of Parliament over Ireland; and though the writer of the able articles in the *Pall Mall Gazette*, who first forcibly insisted on section 24 as a blot in an otherwise acceptable Bill, evidently knew that was not so, yet many public speakers have shown that they were labouring under this delusion, and made that section the main reason of their opposition to the Bill.

§ 8. The Limited Representation of Ireland.

It is, however, understood that Mr. Gladstone would be willing to entertain plans for securing such a representation as would avoid the graver evils of a continuance of the existing arrangements in case self-government be granted to Ireland.

It has been suggested that the electoral arrangements of Ireland should remain unchanged, and the same number of members as heretofore should be returned to the Imperial Parliament, but that they should only have the right of taking part in affairs affecting the Empire generally or Ireland in particular. The difficulty of defining what are Imperial affairs or purely

Irish affairs is not the main obstacle to the adoption of this plan, but the trouble that double elections would involve in the Irish constituencies, the number of the members to be returned, and the practical impossibility of the same members sitting at Dublin and Westminster. The session of Parliament is long enough as it is, and it may be called together at any time. The legislative body at Dublin would have to meet during a part at any rate of the time during which Parliament usually sits, and the conflicting claims of the two legislatures on the time of a man who had a seat in both would make the discharge of his duty impossible.

Another way of dealing with the question has been suggested, I believe for the first time in public by Mr. Yeo*—that the Imperial Parliament should delegate to a British Parliament the same power as to Great Britain that the Irish legislative body would have in Ireland. But this course would give rise here to the very same evils which the retention of the Irish members at Westminster would create. The inconvenience of double elections might no doubt be avoided by providing that the Imperial Parliament should be constituted by the joint assembling of the members of the Irish and British legislatures. But the still graver difficulty (which would be the necessary consequence of this plan) of separating the Imperial executive from the British executive, would

* M.P. for the Gower Division of Glamorganshire.

remain. Unless we are prepared to revise the whole Constitution and reduce its principles to a code, either the attempt to carry on the government with one responsible Cabinet or with two Cabinets, one Imperial and the other British, would land us in confusion. If, indeed, we are ready to undertake this task, the better course would be to divide the United Kingdom into four states or provinces, and convert the Imperial Parliament into a Legislature with limited powers, either consisting of delegations from the provincial legislatures, or of members directly elected.

The only practical course for securing the attendance of members representing Ireland at Westminster that avoids the inconveniences mentioned above seems to be to provide for a delegation from the Irish legislative body to the House of Commons. It is submitted that such a delegation should be constituted on the following general principles:—

(I.) Its numbers should not be so large as to give it a controlling voice when there is a very considerable disparity between the strength of the English parties.

(II.) Its members should be elected by the Irish Legislature, and not directly by the people. Whether they should or should not be members of the Irish body might be left to the discretion of that House.

(III.) In the mode of their election means should be provided for making it representative of the whole Irish Legislature, and not of a party only.

(IV.) The members of the delegation should not have the right of interrogating Ministers on matters relating solely to Great Britain; and the Speaker of the House of Commons (in case of any dispute) should decide whether a proposed question is or is not on a matter relating solely to Great Britain.

(V.) The members of the delegation should not have the right of taking part in any debate on matters relating exclusively to Great Britain, or voting in a division on any motion relating exclusively to Great Britain, or on any Bill applying only to Great Britain, except money Bills, as to which special rules should be settled.

(VI.) In case any dispute arose as to whether on a motion or resolution the members of the delegation had a right to speak and vote, the Speaker might be given power to decide it, subject to an appeal without debate to the House. As to Bills, no dispute could well arise as to whether they applied only to Great Britain.* As to the financial votes and proceedings of the House, which follow each session in a fairly regular course, a list of the matters on which the members of the delegation should be allowed to intervene should be settled; and in case of any dispute the Speaker should decide it, subject to an immediate appeal to the House or the Committee of the whole House.

* Since the Act of Union, all Acts of Parliament extend to Ireland, whether expressly mentioned or not; unless that part of the Kingdom be expressly, or by necessary implication, excepted.—Dwarris, Statutes, second edition, p. 526.

It should also be provided that if the Speaker's decision on the right of a member of the delegation to speak or vote be challenged, and the majority of the House or Committee is against his ruling, such a reversal of his decision should not be deemed a vote of want of confidence.

The attendance of a delegation thus constituted would preserve an evident connection between the Imperial Parliament and the Irish Legislature, and effectually get rid of the notion that Ireland was no longer subject to its sovereignty, while the evils of the existing situation would probably be entirely remedied.

§ 9. Alternative Schemes.

Many of the opponents of Mr. Gladstone's scheme have talked of it as if it were a plan *sui generis*—as if a government with very extensive powers could easily be created by a method totally different and on lines wholly distinct.

It is, of course, necessary to distinguish between local government and Home Rule. The true antithesis of local government is not supreme government, but central government, and such central government may or may not be supreme. A central government, whatever its form, cannot discharge all its functions itself, however small it makes the sphere of its interference; some of the business to be done must be delegated to

individuals or bodies of citizens, with power to transact it over a limited area. The bodies (whether elected or not) that transact the business of local government are of course always to some extent controlled by the central authority. The more numerous the duties devolved on the local bodies, and the less extensive the control exercised over them, the less centralised is the administration. In Ireland the control over local government is exercised by the Lord-Lieutenant, his Chief Secretary, a Local Government Board, a Board of Public Works, a Prison Board, a Board of National Education, and a staff of permanent officials. The executive work thus performed might be, no doubt, transferred to a national council elected by the Irish people; but that would not be giving Home Rule, and it would be open to all the objections that arise to any plan involving the appointing of executive functionaries by popular election. No reform of local government, and no transfer of the control over local government, amounts to Home Rule. By that term the Nationalist party obviously mean a central government subordinate to the Imperial Parliament, with powers of legislative control over all the matters that may be fairly described as not affairs of Imperial concern, including the subjects usually classified by lawyers as coming within the domain of private as opposed to public law.*

* See *e.g.* Holland, "Jurisprudence," pp. 79 and 245 *et seq.*, as to this distinction. Professor Holland places under the head Public Law, (1) Con-

If Home Rule, as thus defined in general terms, is once assented to, it is not too much to say that the main outlines of the Gladstone-Morley scheme must be followed unless legal principles which lie at the very root of the Constitution are attacked. For instance, as we have seen above, the executive government of Ireland was, according to that plan, to continue vested in her Majesty, and to be carried on by the Lord-Lieutenant on behalf of her Majesty, with the aid of such officers as to her Majesty might from time to time seem fit, and from this provision no doubt a Ministry of the colonial type would result; for its effect would be that the Irish legislative body could not elect the members of the executive for a term of years or permanently, though by means similar to those used by the House of Commons it would be able no doubt to control to some extent the power of appointment by the Crown. If this plan is not followed in regard to the Irish executive the doctrine of prerogative is assailed, and it is not easy to see how an executive could be devised that would not be open to very grave objections. To allow the legislative body to discharge all executive functions in regard to Irish affairs would be contrary to all sound political theories. To make the executive officers directly

stitutional Law, (2) Administrative Law, (3) Criminal Law, (4) Criminal Law Procedure, (5) the Law of the State considered in its quasi-private personality, (6) the procedure relating to the State as so considered; and under Private Law, laws creating rights as between private individuals, *i.e.*, as to property, contract, civil injuries, marriage, &c.

responsible to the Irish Legislature would be to diminish greatly the powers of the Lord-Lieutenant and the Imperial Cabinet. The plan of the United States constitution could not be followed, because the head of the State is not a president, but an hereditary monarch. It seems therefore that any one who accepts the principle of Home Rule, and who wishes to proceed on the lines of the Constitution, must, in devising a proposed executive authority for Ireland, adopt the principle of the Bill we have been discussing.

Mr. Chamberlain is the most conspicuous of those who claimed to be adherents of Irish Home Rule and at the same time objected to the rejected Bill, not simply on the details but on the principle of the Bill. He has, however, given an illustration of a scheme founded on principles he would accept—the constitution of the Canadian Dominion. One infers, therefore, that in Mr. Chamberlain's opinion the British North America Act, 1867, is not founded on the same general principles as the rejected Bill. A reference to the Act hardly bears this view out. Mr. Chamberlain says of the Canadian federation, "It shows you how you can have the absolute supremacy of a central and supreme legislative authority, and how that can be maintained with practical autonomy on the part of the local bodies." * In fact, though Mr. Gladstone's Bill does show this, the

* Speech at the inaugural meeting of the National Radical Union, *Birmingham Daily Post*, June 18th, 1886.

relations of the Canadian Parliament and the provincial legislatures under the Act of 1867 do not show any such thing. The Canadian Parliament is not a supreme legislative authority; for by s. 91 of the British North America Act, 1867, its powers are limited to making laws not coming within the classes of subjects by that act *exclusively* assigned to the legislatures of the provinces;* and for greater certainty a list of subjects on which it may legislate is drawn up. By the section defining the powers of the provincial legislatures,† an *exclusive* legislative power is given to them in certain specified classes of subjects. The point to be noticed here is that as to those subjects the power of the Canadian Parliament is expressly excluded, and that in fact the legislative power in Canadian affairs is divided between the Dominion Parliament and the provincial legislatures. The former has no control at all over the latter when they legislate on matters within their powers, but it has power as to defined matters to make laws binding on the whole colony. If, therefore, the relations between the Imperial Parliament and Ireland could be or were framed on these lines, the result would be that the Imperial Parliament would not be a sovereign legislature, but, like the Dominion Parliament

* 30 Vict. c. 3, s. 91. In the case of McClanagan, app., *v.* The St. Anne's Mutual Building Society of Montreal, (3, L.N. 61), the Court of Queen's Bench at Montreal held an Act of the Dominion Parliament to be unconstitutional and void.

† *Ibid.* s. 92.

or the Congress of the United States, a limited legislative authority.

The exclusive legislative powers, too, that are given to the provincial legislatures of Canada are so extensive that if conferred on Ireland they would confer on it a power substantially equal to that which would be acquired under the Bill in question. The Provincial Legislature of Quebec can, for instance, pass laws for "the amendment, from time to time, notwithstanding anything in this Act [*i.e.* the 3 Vict. c. 3], of the constitution of the Province, except as regards the office of Lieutenant-Governor,"* and any laws as to "property and civil rights in the Province," and this without any interference on the part of the Dominion Parliament or any authority in the Empire except the Imperial Parliament. These two classes of subjects are sufficiently wide to cover nearly all the legislation which might on the part of an Irish Parliament cause any of the evils which Mr. Chamberlain apprehends as likely to arise from the legislation of an Irish Parliament, should one be constituted on the lines of Mr. Gladstone's Bill. The criminal law is, indeed, excepted from the powers of the provincial legislatures; but that is precisely the branch of law as to which there is least occasion for diversity among civilised people, and as to which least dispute arises; and it was probably excepted from the powers of the

* Under this power the Legislatures of Manitoba and British Columbia abolished their Upper Houses. Doutre: "Constitution of Canada," p. 207.

provincial legislatures rather to secure uniformity, than because there was any reason to fear that the provincial legislatures would make any improper use of a power to legislate in regard to crimes, *i.e.* offences against the State generally; and it is to be observed that the constitution of the criminal courts and criminal procedure, without which the criminal law would be useless, are left to those bodies.

And if we turn to the constitution of the executive authority for the Dominion, we find that "the executive government and authority of Lower Canada" are declared "to continue to be vested in the Queen."* The Governor-General appoints the lieutenant-governor of each province,† and any such officer appointed after the first session of the Canadian Parliament commenced is not removable within five years from his appointment, except for cause assigned, which is to be communicated to him and signified to the Senate and House of Commons, as provided in the Act of 1867.‡ As to the constitution of the executive of each province, it has been before mentioned that the provincial legislature has the power of amending it without any interference on the part of the Dominion Parliament; and lastly, the control of the administration of justice is given to the provincial legislatures, though the judges (with some exceptions) are appointed by the Governor-General. It is not easy, on a comparison of

* 30 Vict. c. 3 s. 9. † *Ibid.* s. 58.

‡ *Ibid.* c. 6 s. 59.

these provisions with the scheme of the rejected Bill, to understand Mr. Chamberlain's position. In some respects the power of the Imperial Government over Ireland, according to the proposed scheme, would be greater than that of the Dominion Government over the provincial governments under the Act of 1867; and why the former power should be said to be secured by "a paper guarantee" while the latter is "so defined and limited" that its "improper exercise" can be prevented by means "less violent, less extreme than an armed force," is not intelligible.

§ 10. Lord Hartington's Conditions.

Lord Hartington has not put forward any definite scheme for the settlement of Irish affairs; and it is doubtful from his speeches whether he is prepared to assent to anything more than some extension of the sphere of local government in Ireland. He has, however, laid down four conditions to which any plan he is prepared to accept must conform. They are as follows:—

"1. Parliament ought to continue to represent the whole and not merely a part of the United Kingdom. 2. The powers which may be conferred on subordinate local bodies should be delegated—not surrendered—by Parliament. 3. The subjects to be delegated should be clearly defined, and the right of Parliament

to control and revise the action of subordinate legislative or administrative authorities should be equally clearly reserved. 4. The administration of justice ought to remain in the hands of an authority which is responsible to Parliament."

There is about this statement an air of precision, but very slight examination of the third and fourth conditions will show that they at any rate are ambiguous. The first of course was not complied with by Mr. Gladstone's Bill, as the entire exclusion of the Irish members was proposed. It is conceived that the distinction which Lord Hartington draws between the delegation and the surrender of powers is this—delegated powers may be revoked and lawfully resumed at any time by the Government conferring them, at its own sole pleasure, while surrendered powers can only be lawfully withdrawn with the consent of the authority to whom the surrender is made. Or, to put the opposition between delegation and surrender in another way, the effect of delegating powers is to create a subordinate government, and the effect of surrendering powers is to make the government to whom they are so given co-ordinate. If Lord Hartington's meaning is rightly seized, then on the principles explained above, this condition was fulfilled by the Bill brought forward in the last Parliament; and the legislature of Ireland would according to it have only possessed delegated powers, just as the legislature of Victoria has only a delegated authority.

The third condition is really twofold; for the clear definition of the subjects to be delegated, and the clear reservation of the right of Parliament to control and revise the action of subordinate bodies, are distinguishable. The definition of the subjects to be delegated, so far as the legislative authority of a subordinate government is concerned, may be effected (i.) by excepting certain classes of subjects from its control, (ii.) by affirmative formulation of the subjects on which it may legislate, and (iii.) by providing that the laws which it may pass as to anything within its sphere shall not contradict some general principle or violate some condition, or (iv.) by a combination of these processes. By the Government of Ireland Bill, 1886, the limitation of the powers of the proposed Legislature was effected by the first and third of these methods. By section 3 a number of matters, classified under thirteen heads, were excepted from its authority; by section 4 the proposed Legislature was restricted from making laws even as to the subjects coming within the sphere of its power which might contravene the principles laid down in that section. If any one is willing to give to Ireland a Parliament which shall have power to deal with all exclusively Irish affairs, there seems little reason to object to the mode of limiting its powers adopted by the Bill already brought forward. Of course the method of the British North America Act, 1867, might be followed in drawing another Bill—that is, the subjects which are to

be dealt with by the proposed Legislature might be classified under divers general heads; but if the powers to be conferred are to be as wide as those given to the provincial legislatures of the Dominion, very little, if any, additional precision would be secured. Many people seem to imagine that it is possible to define with such clearness the powers of a subordinate law-making body, that there can be no dispute as to whether a certain law which may be passed by it is or is not *ultra vires*. In fact, language is not perfect enough to accomplish such a result. Besides, the further the process of definition is carried the more the discretion of the subordinate body is fettered, and if it is carried beyond a certain point the very object of delegating the legislative power is defeated by the practical withdrawal of all discretion from the subordinate body, and it would be better for the supreme authority itself to undertake the work of making laws on the delegated subjects.

The strict definition of the subjects to be delegated is not, however, nearly so important as the choice of the subjects themselves, as to which Lord Hartington is silent. The determination of the matters to be delegated to the proposed Irish authority is the very first thing to be done by any one who wishes to form a consistent and practicable scheme. Upon the extent of the powers to be given depends the constitution of the authority, and the best way of drafting a Bill to give effect to the plan. If it is intended to create in

Ireland a council to which some of the subjects coming within the domain of administrative law (*e.g.*, poor-law, education, public works) are to be delegated, which is not to have power to alter its own constitution or the existing form of local government, then no doubt it would be well to define as specifically as possible the subjects devolved and the power of making laws. But if "Home Rule" in a wide sense is to be conceded, if the creation of a Government which is to have authority to carry on the central and local government of Ireland as to all domestic affairs, and to make laws as to property, contract, and the matters coming under the head private law is contemplated, then it is submitted it is better not to enumerate positively the powers of the Irish Government, but to limit them by the careful reservation of Imperial rights.

Let us now turn to the other branch of Lord Hartington's third condition. If he means, by the clear reservation of the "right of Parliament to control and revise the action of subordinate legislative or administrative authorities," that the Queen in Parliament, or the High Court of Parliament, should retain the power of controlling and revising the actions of an Irish Government by Act of Parliament, then this is simply a reiteration of the second condition, and would be secured in the case of an Irish Parliament established on the lines of Mr. Gladstone's Bill. But it is apprehended that the real signification of this part of the third condition is that Lord Hartington wishes

that the Houses of Parliament, or rather the House of Commons, should be able to control any subordinate government or governments established in Ireland in a way similar to that in which the departments of the central government are influenced. It cannot be too often repeated that the House of Commons is not by law able directly to appoint or dismiss any minister except its own officers, and that it cannot directly command a minister to do or forbear from doing any act. The power of the House of Commons over the executive arises from its command over the public purse, and from the inability of any ministers or minister to continue carrying on the business of government without possessing its confidence, unless they are prepared at some point or other to break the law and suffer the consequences of an action, prosecution, or impeachment. It follows from this that the power of the House of Commons over the executive Government (other than its power as a part of the Legislature) is limited just where the power of those ministers whose appointment or dismissal it indirectly controls is limited. So far as the discretion of a minister extends, to that point and no further can the House of Commons properly coerce his will or influence him in the exercise of his political authority. It is well to bear these facts in mind in considering the constitution of any Irish Government, because the power of the House of Commons is usually greatly exaggerated; and partly owing to this fact it is continually encroaching

on the special spheres of the executive and the judicial authorities, chiefly by the exercise by members of the right of putting questions to ministers who, anxious to please the House or a section of it, overstep the limits of their duties by making inquiries of and writing letters to judicial and other officials, who are moved to respond either by courtesy or a desire to conciliate persons in a socially and politically commanding station. Notwithstanding, however, this tendency, the control of local authorities by the House of Commons is much less extensive than people ordinarily suppose. For instance, an urban sanitary authority under the Public Health Act, 1875, may appoint or employ such assistants, collectors, and other officers and servants as may be necessary and proper for the efficient execution of the Act, and may make regulations with respect to the duties and conduct of the officers and servants so appointed or employed.* Neither the appointment of such officers and servants nor the regulations† made for their guidance require any confirmation by the Local Government Board; and consequently no pressure which the House of Commons can lawfully bring to bear on the President of the Local Government Board can properly influence the appointments which the local authority may make or the apportionment of duties among its servants.‡ Similar

* 38 and 39 Vic. c. 55, s. 189. † *Ibid*, s. 188.

‡ Otherwise as to medical officers of health or officers appointed by the Local Government Board itself, part of whose salary is paid by the central Government.

remarks are true of other acts which are within the competence of local authorities in England.

As a matter of fact, then, it is only a part of the action of local administrative and legislative bodies that the House of Commons now controls. It has no right to interfere with many of the subjects as to which these local bodies exercise a delegated political power. If Lord Hartington's language be strictly construed, he must be taken as insisting that every action of any central and subordinate Irish Government shall be under the control of the House of Commons; but in order to make such control effective (otherwise than by Act of Parliament) there would have to be some Minister or Ministers responsible for all Irish affairs, not to an Irish Parliament, but to the Imperial Parliament; but how such an arrangement would be possible consistently with anything approaching to Home Rule, or even with Mr. Goschen's "large measure of decentralisation," one is perplexed to see. The truth is that the greater the sphere of subordinate or merely local government is made, the less power will the House of Commons, by its indirect action, have over the executive authority of Government; and if one is desirous of creating any subordinate body in any form he must reconcile himself to this diminution of the power of the popular House. The restriction of the control by that branch of Parliament of the details of administration, far from being considered an evil, would, however, be recognised by most poli-

ticians as one of the greatest gains of an extensive devolution of the powers and duties of Government to new bodies as to the whole of the United Kingdom.

In his last condition Lord Hartington, if his words are not to be taken in a very narrow sense, goes dangerously near to an infringement of the sound principle pointed out by Montesquieu: "Il n'y a point encore de liberté, si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice."* It is to be presumed, however, that what he really means is that the judges of Ireland should be appointed and be removable by some minister responsible (as are the Chancellors of England and Ireland) in fact, though not according to legal theory, to the Houses of Parliament. The position of the judges, according to Mr. Gladstone's plan, has been already commented on, and it is only necessary to add that the Imperial Government, by reserving to the Queen the prerogative of giving or refusing her consent to the dismissal of an Irish judge, on an address for his removal by the Irish body, instead of delegating that right to the Lord-Lieutenant, might make the Irish judges practically independent of the Irish Government. If what Lord Hartington stipulates for by his fourth condition is, that the Imperial Parliament shall retain the right of removing an Irish judge by an address to the Queen, it must be frankly admitted that in view of the condition of Ireland there is much to be said

* "De l'Esprit des Lois," livre xi. chap. 6.

in its favour; but the difference between Lord Hartington and those who would support a new Bill on the lines of the one just rejected is, as to this point, a matter of detail rather than of principle.

Upon the whole, then, from an examination of these conditions, it appears that the first and second may be fairly said to go to the principle, and the third and fourth rather to the details, of any plan for a subordinate Irish Government; that the second may be conceded by the most thoroughgoing advocates of Home Rule; that the third condition, if construed literally, is not fulfilled by the existing local government of England, and if construed more liberally, affords little guidance, unless the general scope of the authority of the proposed government is first settled; and that the fourth condition is one which might be complied with, even if it were proposed to establish a government at Dublin on lines similar to that of Mr. Gladstone's Bill.

With every deference for the authority of Lord Hartington and Mr. Chamberlain, it must be said that the former in laying down his third and fourth conditions, and the latter in suggesting the Canadian system, begin the solution of the problem before us at the wrong end. The first question to be decided by anyone approaching the subject is, whether the proposed subordinate government is to have power to deal with all exclusively Irish affairs, under conditions necessary for the maintenance of the Union, or whether

it is to be simply an authority limited to the discharge of administrative functions. Its form and the restrictions upon its power must depend on the settlement of this question. If the principle of Home Rule—*i.e.* that the proposed Irish Government should have the right of dealing with matters coming within the sphere of private law in Ireland, as well as with some departments of public law—is granted, the next step is to settle what are Imperial as distinct from Irish affairs. The former must then be excepted from the legislative power of any Irish Parliament. The best plan is then to take the principal divisions of the *corpus juris* from any such work as Professor Holland's on jurisprudence, and to consider as to each division what powers of legislation shall be delegated. In regard to private law, it will probably be found that the least objectionable means of limiting the actions of the proposed Irish Legislature will be, not to except certain branches from its powers but to lay down certain general principles which none of its laws shall infringe—(*e.g.* that no law shall be valid which impairs the obligation of contracts, or attacks the fundamental bases of the law of property, or invalidates any title to real property existing at the time of the passing of the Act, without compensation, &c.)—leaving it to the courts of justice to say, as cases arise, whether any particular enactment is or is not a violation of these principles and *ultra vires*. Coming, then, to public law, we have first to deal with the

matters relating to the constitution of the proposed Irish Government. Is it to have power to alter its own constitution, and if so to what extent? Is it to be allowed to change the existing local government and the laws relating to the position of judicial and administrative officers? Are the laws relating to the relief of the poor, education, prisons, railways, highways, &c., to be left to it? Is the substantive portion of the criminal law and the regulation of procedure to be entrusted to it? It is upon the answers given to these and similar questions that the determination of the best method of drafting a Bill for granting Home Rule, and the constitution of the proposed subordinate Government, ought to rest. If Mr. Gladstone's Bill be tested carefully, by applying these questions to it, it will be found that in the main, wherever a doubt could fairly be raised as to the powers of the Irish Government (the principle of Home Rule being of course assumed), it was settled rather in favour of the Imperial Government than of the subordinate authority.

§ 11. The bearing of the Scheme on Federation.

There are many indications that a remarkable change has taken place in public opinion as to our relations with the colonies, which may lead to great alterations in the constitution of the Empire, and there has been of late considerable discussion of the feasi-

bility of plans for making the union of the Empire closer and more effective by "federation." It has been supposed by some that the passing of a Bill for Home Rule on the lines of Mr. Gladstone's measure would tend to defeat this movement. This idea arises partly from the erroneous view that the Bill destroyed the supremacy of Parliament, and partly from a misconception of the term federation.

A federal government is formed by the union of sovereign states for the promotion of the interests common to all. For this purpose the states desiring to be united abrogate certain of the powers of sovereignty, and by agreement confer on a federal government the powers so abrogated. The result is that neither the federal government nor the government of such state is supreme in internal affairs, though the former may be so in regard to foreign relations. The United States of America of course afford the example of a federal union which will occur most readily to the mind. Congress, which is sometimes supposed to be a legislature with absolute powers, is not supreme, and in reality can only legislate on eighteen classes of subjects;* and an Act of Congress may be pronounced by a court of justice to be *ultra vires* and void. The supremacy of a legislative body is impossible in a federal union of states, and before the British Empire can be federated, in the proper sense of the term, the sovereignty of Parliament must be

* Constitution of United States, Art. 1, sec. 8, Farrar's Manual, p. 6.

extinguished. Though the passing of a Bill such as we have been discussing would still leave the Empire a state held together *jure imperii*, and not *jure societatis*, yet it would be a step towards federation in the proper sense of the term; for before there would be any chance of the success of a federal union of the territories now subject to Parliament, the United Kingdom would have to be divided into at any rate three states. One of the first conditions of a successful union on a federal basis is that there shall be no very marked inequality between the states.* The United Kingdom is a great deal too powerful, in regard to the colonies individually, for a federal union in which it would be a single state to be stable and efficient.

But the term "federation" is obviously often used loosely to mean either the extension of the right of representation in the Imperial Parliament to the colonies, or the creation of some new representative body elected from all the territories of the Empire, with power of legislation on imperial concerns. The House of Commons is already so numerous and so over-weighted with business that the adoption of the first of these alternative plans simply, without the devolution of a large proportion of the work to legislative bodies for England, Scotland, Wales, and Ireland, would be impracticable. Even if it could be carried out by the diminution of the number of the members for the United Kingdom, it would be felt with justice by the

* See Mill, "Representative Government," c. 17, as to this.

English people very unfair for a majority composed possibly mainly of Canadian, Australian, Irish, and Scotch representatives to control purely English affairs. It is not unusual even now to hear complaints that the influence of the other parts of the kingdom in the House of Commons is so great that the wishes of the English counties are overborne; and the feeling that prompts these expressions would be intensified by the presence of colonial members. The only practical plan on which the colonies could be allowed a direct voice on imperial policy by representation in Parliament would be by the delegation of the domestic affairs of the different portions of the United Kingdom to subordinate governments, and the reservation by Parliament to itself only of the matters in which the whole Empire has a common interest. It is clear enough that the passing of such a Bill as Mr. Gladstone proposed, far from tending to defeat any change in the direction of federation, either in its strict sense or in the popular signification just mentioned, would mark a distinct advance towards the realisation of the project.

§ 12. Conclusion.

The general conclusion which it is believed ought to be drawn from this inquiry is, that the establishment of such a Government at Dublin as would result from a bill drawn on the principles of that of

Mr. Gladstone and Mr. Morley would result in the maintenance of law and order by the creation of a law-abiding national character in Ireland; that the sovereignty of Parliament would not be thereby infringed from a constitutional point of view; that the effective power of the Queen's Government over that island would be strengthened; and the unity of the three kingdoms and of the Empire made more real and lasting.

Whether, having regard to the religious differences which exist in Ireland, and the economic state of the country, the interests of the minority were sufficiently protected by the Bill of Mr. Gladstone, is a question which is not directly connected with the inquiry that has been pursued in these pages, and which requires independent investigation. As to the fears entertained, or at any rate expressed, that the establishment of an Irish Parliament would lead to oppression of Protestants, it may be very confidently stated that the restrictions imposed by the 4th section of the rejected Bill on the Irish legislative body were quite sufficient to prevent any persecution of Protestants or the undue favouring of Catholics by any statute that could stand the trial of its validity in a court of justice. But, in fact, so far as one can see, the apprehensions of Catholic ascendancy in any improper sense are baseless.*

* See Canon MacColl's forcible remarks on this point, "Reasons for Home Rule," 3rd edition, p. 68.

It would take me too far from the main subject of this essay even to touch on the means that should be taken to protect landowners from any measures as to real property which might be passed by the proposed Irish Parliament, and which might prejudicially affect those now interested in the land of Ireland. In considering the draft of the Bill, it must be remembered that the Land Bill formed an integral part of the Government scheme. Assuming that this measure is dropped, it would no doubt be only just to limit the powers of the Irish legislative body in dealing with the law of real property. It must, however, be remembered that the best security for property is to be found in the enforcement of law with the general consent of the community. It has been pointed out also that there is nothing to show that the Irish people have been or are actuated by any socialistic impulses; on the other hand, everything seems to show a passionate attachment on their part to the principle of private property in land. The agitation in Ireland has been due not so much to hostility to the existing law of real property as a system, as to the deep conviction of the Irish people that the landlords have no just or moral title to the profits of the land, and for the explanation of this conviction we must go back to those effects of the English conquest to which attention has been drawn above.

That so generous a measure of Home Rule as was offered by the Cabinet of Mr. Gladstone should have

at once commended itself to the country, was hardly to be expected; but even now in the hour of disappointment the Prime Minister and his colleagues have the satisfaction of feeling that the time is not far distant when it will be recognised by all parties that the true solution of the long-standing Irish difficulty lies in the adoption of some such scheme of government as they have suggested. The causes of Irish disorder are too deep-rooted to be removed by any measure for the extension of mere local government. No plan that does not meet the reasonable claims of Irish nationality will suffice to appease the existing discontent, and it was the peculiar merit of Mr. Gladstone's Bill that it amply recognised this necessity.

The only course logically consistent with a denial of the demands of the national party is a policy of resolute coercion. We may again resort to oppressive laws and armed force. If we do, we shall doubtless obtain a superficial triumph; but victory will be purchased at too great a cost, for its inevitable consequence will be that every Irishman of spirit will quit his native land to find a new home beyond the seas, and bequeath to his children a legacy of hate and a hope of vengeance; while there will be left behind only a soulless remnant from whose dull eyes the lively light of Celtic genius will have gone for ever.

The policy of conciliation is based on an extension of the confidence already reposed by the Constitution in the Irish people—on the belief that they have

the same capacities for self-restraint and development that other races possess, and the conviction that they will, when the national spirit is fairly met, learn to subordinate their own interests to the common good of the whole Empire. No doubt this confidence may be misplaced; the hopes we form may be disappointed. "In nature's infinite book of secrecy" we can read but little, and what we have learnt does not enable us to predict with certainty the consequences of any political action. We can only guide our conduct in the affairs of the State by inferences drawn from our knowledge of human nature and the lessons of history; and most assuredly, when tried by these inferences, a patient, large-hearted, and generous policy towards Ireland is more likely to succeed than to fail, more likely to cement than to dissolve the Union. "Magnanimity in politics is not seldom the truest wisdom; and a great Empire and little minds go ill together."